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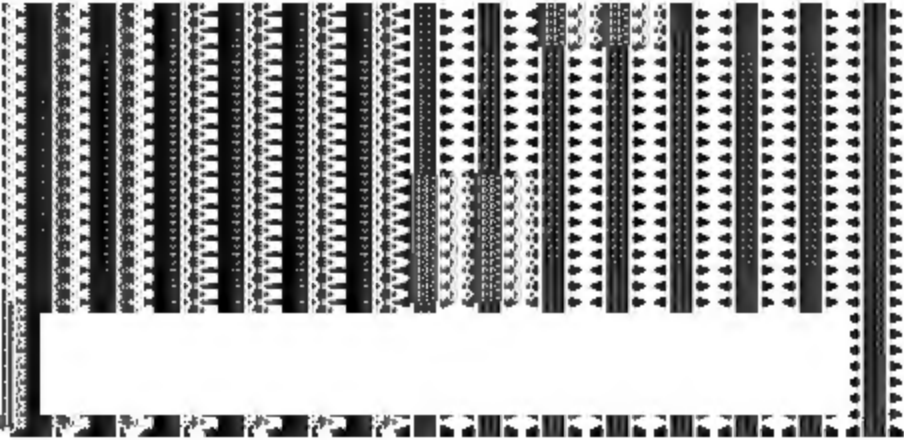
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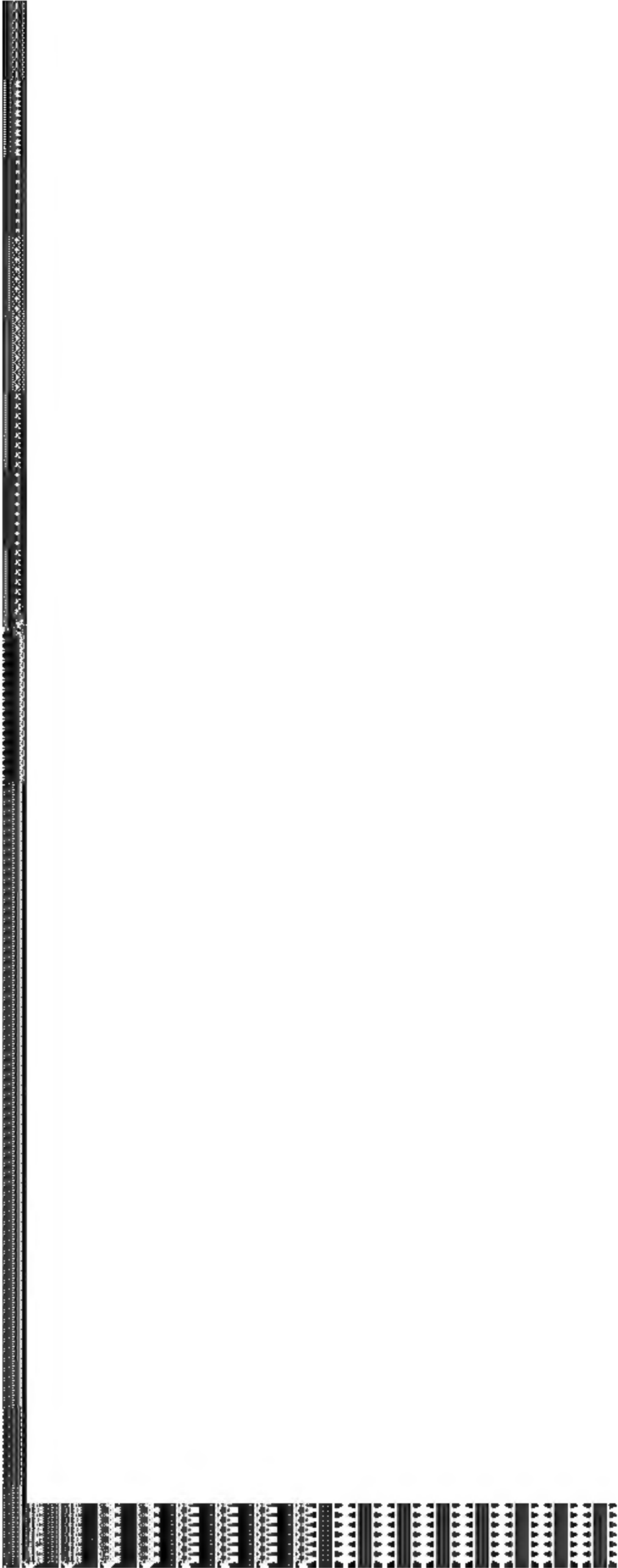
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REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature,
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND
THE CORRECTION OF ERRORS,
IN THE
STATE OF NEW-YORK.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

VOL. XX.

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JUDGES

OF
THE SUPREME COURT OF JUDICATURE
OF

THE STATE OF NEW-YORK,

DURING THE TIME OF

THE TWENTIETH VOLUME OF THESE REPORTS.

AMBROSE SPENCER, Esq., *Chief Justice.*

JOSEPH C. YATES, Esq. (*Resigned September 19, 1822.*)

JONAS PLATT, Esq.

JOHN WOODWORTH, Esq.

Attorney General.

SAMUEL A. TALCOT, Esq.

SOUTHERN DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the eighteenth day of June, in the forty-seventh year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. XX."

In conformity to the act of the Congress of the United States, entitled, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An Act supplementary to an act, entitled, An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES DILL,
Clerk of the Southern District of New-York.

Entered according to Act of Congress in the year one thousand eight hundred and fifty, by Maria Johnson widow, Maria C. Johnson, Eliza F. Blaney, William T. Johnson and Julia S. Johnson, children of William Johnson deceased, in the Clerk's Office of the District Court of the Southern District of New York

TO
AMBROSE SPENCER, ESQ.

STATE
CHIEF JUSTICE
OF
THE STATE OF NEW-YORK.

DEAR SIR,

ABOUT to close the last Volume of these Reports, I cannot suffer it to pass from my hands, without expressing my grateful acknowledgments for the kind assistance and encouragement received from you, during their progress. The continued approbation of those whose judicial determinations it has been my humble duty to record, while it animated exertion, has afforded the most pleasing reward for the unceasing attention, and anxious diligence, required in the prosecution of a long and laborious work.

Of the character of decisions to which you have so largely contributed, it does not become me here to speak. Those who, in the course of their professional attendance on the court, have observed your unwearied attention to the arduous duties of your judicial station; your promptness and facility in the despatch of business; the readiness and ease with which you have penetrated and unfolded cases the most obscure and intricate, placing their merits in the strongest and clearest light; the force and precision with which you have stated and explained the reasons and grounds of every judgment; and your accurate discrimination and just application of the authorities adduced in their support,—know best how to estimate the extent and value of your judicial labors, and to do justice to the learning and ability for which they have been so eminently distinguished.

Permit me, dear sir, with the most cordial wishes for your future happiness, to dedicate to you the concluding volume of a series commenced not long after your appointment to the Bench, and terminating at the time when you ceased to preside in the highest Court of Judicature of the State.

With sincere respect,

I am, your obliged

and humble servant,

WILLIAM JOHNSON.

NEW-YORK, June, 1823.

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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN MAY TERM, 1822, BEING THE FORTY-SIXTH YEAR OF OUR
INDEPENDENCE.

MEMORANDUM.—*During the last vacation Mr. Justice VAN NESS resigned his office of a judge of this court.*

THE OVERSEERS OF THE POOR OF THE TOWN OF MARBLE- TOWN *against* THE OVERSEERS OF THE POOR OF THE TOWN OF KINGSTON.

THIS cause was submitted to the court, by the counsel for the parties, without argument, upon the following case: The cause came before the Court of Sessions of Ulster county, in April, 1821, on an appeal from the order of two justices, removing a pauper from the town of Kingston to the town of Marbletown. The Court of Sessions dismissed the appeal, and confirmed the order. The facts were these: *Francisca*, the mother of the pauper, was born in 1800, in the town of Marbletown, of parents who were slaves, in the house of *J. H. Hasbrouck*. Her master, according to the then existing law, on the 10th of December, 1801; abandoned her to the overseers of the poor of *M.* *Francisca* went with her mother to *Rochester*, and thence to *New-Paltz*, and about *four years since, her grandmother purchased her time, and she came to reside with her at *Kingston*. In 1817, she married the slave of *H.*, residing at *K.* By her husband, she had a child, named *Dinah*, born in *K.* *Francisca* and her husband cohabited together, as husband and wife, until her death, which happened

custody and control of them, during infancy, belongs to the mother, as if the father were dead; and the settlement of the children belongs to the town in which the mother had her last legal settlement, without regard to her slave husband. (a)

Marriages, where one or both of the parties are slaves, are, by the statute, (2 N. R. L. 201. sess. 36. ch. 88.) legal, and the issue legitimate. Where the wife is a free woman, and the husband a slave, the latter is not emancipated, nor the former enslaved, by the marriage; and

[* 2]

the children of such a marriage follow the condition of their free mother, as to their civil rights; and the

(a) Vid. *Jackson v. Lewey*, 5 Cow. Rep. 895. *Jackson v. Ely*, Ibid. 314. 2 Rev. Stat. 156. 1 Rev. Stat. 655.

NEW-YORK,
May, 1822.

OVERSEERS
OF MARBLE-
TOWN
V.

OVERSEERS
OF KINGSTON.

soon after the birth of *Dinah*, and about a year ago. The husband of *F.*, during all the time of their marriage, and ever since, resided with his master, an inhabitant of *Kingston*. After the death of her mother, *Dinah* became a town charge, and was removed from *K.* to the town of *M.*, as the place of her last legal settlement. The question was, whether the settlement of the pauper was in *K.*, by virtue of the marriage of her mother in *K.*, or by birth, or otherwise.

PLATT, J., delivered the opinion of the court. This is a case made on an appeal by the overseers of the poor of *Marbletown* against the overseers of *Kingston*, in the General Sessions of *Ulster* county. The facts are, that *Francisca*, the mother of the pauper in question, was born of slave parents, in the town of *Marbletown*, in 1800; and in 1801, pursuant to the 10th section of the act of the 8th of *April*, 1801, (i *K. & R.* ed. 616.) she was regularly abandoned by her master to the overseers of that town, and thereby she became a free pauper of that town, with power in the overseers to draw her support from the state treasury, &c. In 1817, she went to *Kingston*, and was there married to a *slave*, residing with his master, Mr. *Hasbrouck*, an inhabitant of that town, by which *slave* she had a child, *Dinah*, the pauper in question. The mother died at *Kingston*, leaving her husband living, and who still lives with his master. *Dinah* was removed by order of two justices to *Marbletown*, as her place of settlement, from which order there is an appeal; and we are called on to advise and instruct the Sessions. It is clear, that by force of the statute of 1801, the mother was a pauper of *Marbletown*, and the child, *Dinah*, would follow the condition of the mother, unless her marriage with a *slave* in *Kingston* makes a difference in the case.

[* 3]

The "act concerning slaves and servants" (*N. R. L.* 201. s. 2.) declares, that all marriages, where one or both of the parties are slaves, are equally valid as though the parties were free, and their issue is declared to be legitimate. But there is a proviso, that it is not to operate as an *emancipation*. It is a rule, that children follow the condition of the mother, where both parents are slaves, and *a fortiori*, it ought to be so where the mother is *free* and the father a *slave*. I understand the object of this statute to be merely to legalize marriages between such unequal parties, and to render their offspring legitimate; and I cannot admit that by such a marriage, a *free wife* subjects herself to the custody and control of the *slave husband*. The general law of *baron and feme* cannot apply to such a case. The husband is not *emancipated*, nor is the wife *enslaved* by such a marriage. I am inclined to listen to the suggestions of policy and humanity, which I think dictate the rule, that the children of such marriages shall follow the condition of the *free mother*, as to all their civil rights and duties, and that she shall have the exclusive custody and control of them, as though their father were dead; and in reference to the settlement of paupers, I think the most consistent rule will be, to consider the children of such marriages as belonging to the town in which the mother had her last legal settlement, without any regard to her *slave husband*. We are,

therefore, of opinion, that the order of the justices for removing the pauper to *Marbletown* ought to be affirmed.

NEW-YORK,
May, 1822.

Order of Sessions affirmed.

BISSELL
v.
PAYN.

BISSELL against PAYN.

IN ERROR, on *certiorari* to a justice's court. *Payn* sued *Bissell*, before the justice, in an action of debt for rent reserved *on a written lease. It appeared, that during the term, and before the rent had accrued, all the title and estate of *P.*, the lessor in the demised premises, were sold by the sheriff, on a judgment and execution, in favor of a stranger, against *P.* The sheriff, on such sale, had given to the purchaser a regular certificate, and filed a duplicate thereof, pursuant to the act, entitled, "An act in addition to the act concerning judgments and executions," passed *April* 12, 1820. (sess. 43. ch. 184.) (a) But the time allowed to the debtor, (*P.*) by the statute, for the redemption of the premises, had not expired; and, of course, no deed had been executed by the sheriff to the purchaser. The defendant set up the sale and certificate as a defence against the plaintiff's right of action. The justice overruled the evidence as irrelevant, and gave judgment for the plaintiff below, for the amount of the rent due.

Where land of
a debtor is sold

[* 4]

under an execution, pending a lease by the debtor, and before the rent has accrued, and a certificate is given to the purchaser, pursuant to the statute passed *April* 12, 1820, (sess. 43. ch. 184.) (a) the debtor, notwithstanding the sale and certificate, is entitled, until the time for redemption allowed him by the statute has expired, and the sheriff's deed is executed, to receive and sue for the rents which have in the mean time accrued; for the possession and enjoyment of the land remains in the same state, after the sale, and until the time for redemption has expired, as before the sale. And the sheriff's deed does not retrospect, but must be dated after the time for redemption has expired. Such a sale is conditional merely, and the purchaser, until the

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sheriff's deed is executed, has a lien only on the land. (b)

Per Curiam. Upon examining the provisions of the statute, (sess. 43. ch. 184.) (a) we are of opinion that the justice decided correctly. The statute intended to leave the possession and enjoyment of the land, after the sale and certificate, and until the time allowed for its redemption had expired, in the same state it was in before the sale. The sale of the land is provisional only; and operates like a decree of foreclosure on a mortgage. If the debtor does not redeem his land within a year, the sheriff is then directed to execute a deed, &c. According to the correct practice under this statute, the sheriff's deed ought to bear date after the time for redemption has expired. The certificate, *of itself*, transfers no title. It is evidence merely of an inchoate and conditional sale; and until the deed of the sheriff is executed, the purchaser has a *lien* only on the land; he has no title to the rent which has accrued prior to the time when the right of redemption expired. The terms of the statute do not require the construction, that the deed, in its operation and effect, shall retrospect to the day of sale, which must always be fifteen months before the execution of the deed by the sheriff: and it would be very inconvenient and unjust to deprive the judgment debtor of the rents accruing during that interval of time. If he cannot receive *and sue for such rents, it follows that no person has a right to collect them; and the tenant, during that time, cannot safely pay his rent; for it is utterly un-

(a) 2 Rev. Stat. 370.

(b) Vid. *Evertsen v. Sawyer*, 2 *Wendell's Rep.* 501. *Ex parte Peru Iron Co.* 7 *Conn. Rep.* 540. *Van Rensselaer v. Sheriff of Onondaga*, 1 *id.* 445. *Same v. Sheriff of Albany*, 1 *id.* 501.

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certain whether a deed will be given at all; or, if given, whether it will be to the purchaser at the sale, or to a subsequent judgment creditor. The judgment must, therefore, be affirmed.

Judgment affirmed.

JACKSON, *ex dem.* SHERRILL, against BRUSH.

An acquiescence on the part of the landlord, as that his tenant should pay the rent to a third person, is sufficient to render an attornment valid.

A conveyance by a person indebted at the time, absolute on the face of it, but intended to enable the grantee to sell the land, and pay the debts of the grantor, rendering the surplus, if any, to him, is void as against his creditors. (a)

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EJECTMENT for a house and lot in *Poughkeepsie*, tried before Mr. Justice Platt, at the *Dutchess* circuit, in 1820. The defendant, by agreement, was made defendant in the place of *Moses Armstrong*, who was the tenant in possession, at the commencement of the suit. The lessor of the plaintiff gave in evidence the records of two judgments in the Supreme Court in favor of the *Middle District Bank* against *Robert G. Livingston*, both docketed the 9th of *August*, 1816; and two executions issued on the same judgments, tested the 14th of *August*, 1819, returnable at the *October* term following, and which were delivered to the sheriff on the 22d of *September*, 1819. Also, a deed from the sheriff of *Dutchess* to the lessor of the plaintiff, dated *January* 13, 1820, for the premises in question, for the consideration of eighty dollars, and reciting the two executions.

Moses Armstrong testified, that he took possession of the premises in question, in the spring of 1814, under *Cornelius Brown*, to whom he paid rent for two years. In the spring of 1817, one *Sleight* informed him that he and *Robert G. Livingston* had purchased the property, and the witness then paid the rent to *Sleight* for a year and a half, or two years, to which *Brown* made no objections. Afterwards, *Brush*, the defendant, said that he had purchased the premises and claimed the rent. The witness informed *Sleight* and *Robert G. Livingston* of the claim of the defendant, and they claimed *a part of a quarter's rent, but finally acquiesced in the right of the defendant, to whom the witness paid the whole rent.

Robert G. Livingston, a witness for the defendant, testified, that *Cornelius Brown* conveyed the premises in question to him and *Sleight*, in *March*, 1817. The witness and *Sleight* were in negotiation for the sale of the premises to *Brush*, who agreed to give three thousand dollars for the property; and they left *Brown's* deed with him for the purpose of having a deed drawn from them to *Brush*, but the bargain was broken off, in consequence of *Brush* requiring a warranty, which *Livingston* and *Sleight* refused to give. This was a short time before *Brush* purchased the property at the sheriff's sale. The deed in question was never returned to *Livingston* and *Sleight*, and it appeared that due notice was given to the defendant to produce it at the trial, which he had declined to do. The witness further testified, that the conveyance from *Brown* (who was their brother-in-law) to him and *Sleight*, was for the purpose of securing a debt due from *Brown* to the witness, and to enable them to sell the property, and pay *Brown's* debts, returning

(a) Vid. *Seward v. Jackson*, 8 Cow. Rep. 406.

the surplus, if any, to *Brown*; that the witness informed *Brush* of this fact at the time of the negotiation between them, and that the deed was absolute on the face of it. That at the time the deed was executed, he heard that some of the creditors of *Brown* were pressing him; and he thought *Brown* would not be able to pay his debts if the property was sacrificed. That immediately after the deed was given, he offered the property for sale publicly, and supposed that it was worth enough, at that time, to pay all *Brown's* debts. The witness further stated, that he never consented that *Armstrong* should pay rent to the defendant, or that he should become his tenant, except on the supposition that the defendant was to become the purchaser of the property from the witness and *Sleight*. The witness took a note from *Brown* for the balance due to the witness on a settlement, of 673 dollars and 66 cents, which was read in evidence; and the witness stated that part of the note was for about 300 dollars due to him from *Brown* at the time the deed was executed, and the residue for a debt which had accrued subsequently; and that this note was assigned by him to the lessor of the plaintiff. The witness was objected to by the defendant as incompetent, but the judge overruled the objection; and the lessor of the plaintiff, to whom the judgment had been assigned by the *Middle District Bank*, executed a release to the witness of all claims under the judgments and executions. The plaintiff next gave in evidence a quit-claim deed of the premises to him from *Robert G. Livingston*, dated September 13, 1819.

The defendant gave in evidence the record of a judgment in the Court of Common Pleas of *Dutchess* county against *Cornelius Brown*, docketed the 6th of April, 1818, and an execution issued thereon, tested January 22, 1818, and delivered to the sheriff April 11, 1818; and a deed of the sheriff to him, on a sale by virtue of the execution, dated June 5, 1818, for the consideration of 355 dollars, for a part of the premises in question; also, a record of a judgment in the Court of Common Pleas in favor of *James Wilson*, against *Cornelius Brown* and *Robert G. Livingston*, docketed July 8, 1818, and an execution issued thereon; also, the record of another judgment in the same court in favor of *E. Sterns*, against *Brown*, docketed July 9, 1817, on which execution was issued and delivered to the sheriff. The defendant then gave in evidence a deed from the sheriff to him, dated October 6, 1818, for the consideration of 300 dollars, reciting the two last-mentioned executions, and conveying to the defendant the other part of the premises.

It was proved, that about the time of the first sale by the sheriff to the defendant, *Sleight*, on being asked if he was going to attend the sale, said, that the deed to him and *Livingston* was given for the purpose of selling *Brown's* property, to pay his debts; and if any thing was left, *Brown* was to have it; that he (*Sleight*) had made no advances, though *Livingston* had; and that he (*Sleight*) had, therefore, no interest in the property. At the time of the sale, it was understood that *Livingston* and *Sleight* had a deed of the premises.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the facts above stated.

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*Oakley, for the plaintiff, contended, 1. That the *attornment* of *Armstrong* was void. There was no evidence that it was with the consent of *Livingston*, and he must still be considered as the tenant of the lessor. (*Jackson*, ex dem. *Sagoharie*, v. *Dobbin*, 3 *Johns. Rep.* 223. *Jackson*, ex dem. *Vandeuzer*, v. *Scissam*, 3 *Johns. Rep.* 499. *Jackson*, ex dem. *Smith*, v. *Stewart*, 6 *Johns. Rep.* 34. *Jackson*, ex dem. *Davy*, v. *Watts*, 7 *Johns. Rep.* 157. *Jackson*, ex dem. *Anderson*, v. *M' Cleod*, 12 *Johns. Rep.* 182. 1 *Caines's Rep.* 444 2 *Caines*, 215.)

2. That the declarations of *Sleight* were not admissible evidence. The rights of tenants in common are distinct; and one cannot be allowed, in any way, to defeat the right of his co-tenant. If he cannot do this by deed, *a fortiori*, he cannot by parol declarations. Again; he was offered as a witness to prove that the deed was in trust; but he was inadmissible for that purpose. (7 *Johns. Rep.* 186. 10 *Johns. Rep.* 336. 358. 16 *Johns. Rep.* 302. 306. 1 *Johns. Chan. Rep.* 342.)

3. *Livingston* had an interest in the premises which was bound by the judgment, and might be sold by the execution. He was either seised of the premises absolutely in fee, or is to be considered as a mortgagee in possession; or, thirdly, he must be deemed a trustee for the creditors, after payment of the debts of *Brown*. We contend that he was a mortgagee in possession. An equity of redemption may be sold under an execution against a mortgagor in possession. (*Waters v. Stewart*, 1 *Caines's Cases in Error*, 47.) But before foreclosure, the mortgaged premises cannot be sold under an execution against the mortgagee. (*Jackson v. Willard*, 4 *Johns. Rep.* 41—43.) The residuary interest of *Brown*, after payment of his debts, could not be sold on an execution against him. (*Wilkes v. Ferris*, 5 *Johns. Rep.* 335. 8 *East*, 467. 485.) The only remedy is in the Court of Chancery for an account. The court having decided (4 *Johns. Rep.* 43. 6 *Johns. Rep.* 294. 7 *Johns. Rep.* 282.) that the premises could not be sold under an execution against a mortgagee out of possession, it seems to be impliedly admitted, that if he is in possession it may be sold. Though a judgment at law is not a *lien* on a mere equitable interest, *a judgment and execution will pass any interest which a court of law can protect. (*Bogert v. Perry*, 1 *Johns. Ch. Rep.* 56, 57.) This court, in *Jackson*, ex dem. *Stone*, v. *Scott*, (18 *Johns. Rep.* 94.) decided, that a person in possession of land under a contract for the purchase of it, had an interest in it, which might be sold on execution. (7 *Johns. Rep.* 205. 16 *Johns. Rep.* 189. 192.) Now, *Livingston's* possession being united with his legal title as mortgagee, there is an interest which might be sold under the execution.

But if *L.* is not deemed a trustee in possession, yet his interest is so absolute and entire, as against *Brown*, that it may be sold. So that, whether *L.* is considered as the owner in fee, or a mortgagee in possession, or a trustee, he had an interest which might be sold under the execution. It may, perhaps, be objected, that the deed from *Brown* to *S.* and *L.* is void, on account of the residuary interest reserved to *B.*; but that is merely after payment

of all his debts, and is no more than the law would give him. Again, creditors only can make this objection, and the conveyance was for their benefit. Such a residuary interest exists in every case where property is assigned to pay debts; but unless the conveyance is colorable, and made for the sake of such a resulting trust, it is not void. (*Wilkes v. Ferris*, 5 Johns. Rep. 335—345.)

4. But considering this conveyance as a mortgage, then the lessor of the plaintiff was the assignee of that mortgage, by the assignment of the debt to him by the bank, as well as by the quit-claim from *L.* to him; and as assignee of the mortgage he may maintain ejectment.

Brush, contra, insisted that the deed could not be considered as a mortgage, nor was it recorded as a mortgage. There was no debt, note, bond or account due to *L.* It was proved not to be an absolute conveyance; and, indeed, that seems to be admitted. If any thing, it must be a deed in trust; and, as such, it is clearly fraudulent and void. (*Hyslop v. Clark*, 14 Johns. Rep. 458. *Murray v. Riggs*, 15 Johns. Rep. 571.) The lessor was out of possession, and the sale under the judgment and execution against *L.* was subsequent *to the purchase of the defendant. (*Jackson*, ex dem. *Marten*, v. *Bush*, 10 Johns. Rep. 223. *Jackson*, ex dem. *Bowne*, v. *Henman*, 10 Johns. Rep. 292.)

YATES, J., delivered the opinion of the court. A question is made with regard to the attornment of *Moses Armstrong*, the tenant in possession, to the defendant.

It is objected, that this attornment is void; and that *Brush* being made defendant, as landlord, by consent, the lessor is entitled to the possession as against him, in the same manner as he would be against *Armstrong*, as his tenant.

The facts disclosed by the case on this subject abundantly show that the lessor of the plaintiff ought not to recover on that ground. If *Armstrong* had attorned without the assent of *Livingston* and *Sleight*, the plaintiff's recovery could not be avoided. The attornment would have been void under the statute, and *Brush* having been made defendant, as landlord, by the lessor's consent, the settled principle between landlord and tenant, in relation to attornment, must have controlled the case. The fact, however, is otherwise; it not only appears that it was done with their knowledge and acquiescence, but, from *Livingston's* testimony, it would seem they assented to it. He states, that he never consented *Armstrong* should pay rent to the defendant, or should become his tenant, except on the supposition that *Brush* was to purchase of him or *Sleight*. His supposition does not alter the fact; (if those were his impressions at the time) he ought to have consummated the sale before he gave his assent to the change of tenancy. *Sleight's* claiming the rent, after the defendant's purchase at the sheriff's sale, up to a specified period, shows an acquiescence, which amounts to an assent on his part, presenting a case clearly excepted by the statute, (1 N. R. L. 443.) and within its provisions, being an attornment with the privity and consent of the

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landlord. At all events, it is sufficient to prevent a recovery on the ground of tenancy. This is, also, conclusive against the lessor's claim under the quit-claim deed of the 13th *September*, 1819, from *Livingston* to him, because the premises were held adversely by the defendant, at the time, so *that nothing could pass by it. The lessor's right to recover, therefore, depends altogether on the validity of the deed from *Cornelius Brown* to *Livingston* and *Sleight*, given in *March*, 1817.

It cannot be questioned but that *Cornelius Brown* was largely indebted at the date of the above conveyance. *Livingston* himself states, that he heard some of his creditors were pressing at the time. The record of one of the judgments under which the defendant purchased, was filed the 9th of *July*, 1817, and the suit commenced as of the preceding *April* term. This was almost immediately subsequent to the conveyance by *Brown*. The circumstances that the grantees were brothers-in-law to the grantor, and that *Sleight*, one of them, does not pretend to have had any demand against him, at any time, and that they had possessed the premises for near two years, without doing any thing, throw a cloud over the transaction, and show its true character; and the explanation given by *Livingston* is not sufficient to change it.

If this deed had been given to *Livingston* alone, to secure the alleged debt of 300 dollars, and the existence of that debt at its date had been shown, it would present a different case; but *Sleight*, who, according to *Livingston's* testimony, had no demand against *Brown*, is made a co-grantee, and it cannot be pretended that an existing debt, due *Livingston* at the date of the deed, has been shown. The period of settlement between them appears, by the date of the note given for the alleged balance, to be in *April*, 1818, long subsequent to the docketing of one of the judgments under which the defendant claims title to part of the premises, and when near two years' rent had been received, which, if specially accounted for, we must suppose would have been sufficient to pay off the amount stated to have been due at the date of the deed. No particular statement of the accounts, as adjusted at that time, appears; *Livingston* only declares that the note was given for 673 dollars and 66 cents, the amount of a balance due him, partly for a debt before the giving of the deed, and partly for an account accrued subsequently. From the facts and circumstances disclosed in the case, it seems manifest that the conveyance *from *Brown* to *Livingston* and *Sleight* was without consideration, and made with an intent to hinder and delay creditors, and, of course, void by the statute of frauds.

The lessor of the plaintiff, then, if this deed is inoperative and void, can take nothing by the sheriff's deed, on the judgments and executions against *Livingston*; nor can the deed be deemed operative, as a mortgage, because no existing debt satisfactorily appears, at the time it was given. Judgment must be entered for the defendants.

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**DIEFFENDORF against THE TRUSTEES OF THE REFORMED
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IN ERROR, on *certiorari* to a justice's court. The trustees of the Reformed Calvinist Church at Canajoharie, in the county of Montgomery, sued *Dieffendorf* before the justice for the amount of his subscription, by which he engaged to pay them, annually, one dollar and fifty cents, and a load of wood, "for the support of the ministry of the said church, as long as the Rev. John I. Wack is and remains our regular preacher." It appeared, that in September, 1816, the *classis* of Montgomery tried and deposed Mr. Wack, for immoral conduct. On the same day, he appealed to the particular synod of the Dutch Church; and in November, 1816, that synod resolved, "that the appeal be sustained, on the ground of informal, irregular and unconstitutional proceedings by the *classis* of Montgomery in the case." The particular synod then recommended that the consistories of Stone-Arabia, Fort Plain and Westerlo should meet and investigate the rumors and charges, and prefer a complaint against Mr. Wack to the *classis* of Montgomery, if they saw fit. Those three consistories never met. The *classis* of M., at their next meeting, in January, 1817, having no charges presented to them against Mr. Wack, resolved, that the Rev. Mr. Wack be reinstated in full communion with his congregation, and in the exercise of his ministerial functions. At the next meeting of the *classis* of M., on the 6th of May, 1817, a resolution was passed, declaring that the last order or resolution of the *classis*, for reinstating Mr. W., was irregular and void. At the next meeting of the same *classis*, on the 12th of May, 1817, it was resolved, "that Mr. W. should still be considered as deposed from his office as minister of the gospel." On the 12th of January, 1820, at another meeting of the same *classis*, and of the consistories of Fort Plain and Stone-Arabia, Mr. Wack did not appear, and it was "resolved, that finding no reason why the deposition of said Wack should be annulled, it shall be continued."

The defendant below offered to prove, by witnesses, that Mr. Wack was a man of immoral conduct, and guilty of drunkenness, profanity, and other vices, degrading to his character as a minister; but the testimony was rejected by the justice. A verdict was found for the plaintiffs below, for eight dollars and fifty cents, damages, on which the justice gave judgment.

There were incidental questions arising on the return, which were not considered material, and both parties expressed a desire to have the cause decided on its real merits.

Waggoner, for the plaintiff in error.

Dodge, for the defendants in error.

the subsequent proceedings of the *classis*, being irregular, could have no effect on that decision, by which Mr. W. was restored to the ministry; and that, therefore, the relation of minister and congregation not being dissolved between W. and the church, to the support of whose ministry D. had subscribed, D. was liable to pay an amount of his annual subscription. (a)

D. subscribed a writing, by which he engaged to pay to the Trustees of the Reformed Calvinist Church of Canajoharie, in the county of M., annually, one dollar and fifty cents, and a load of wood, "for the support of the ministry of the said church, as long as the Rev. John

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I. Wack is and remains our regular preacher."

The *classis* of M. (one of the ecclesiastical tribunals of the Reformed Dutch Church) deposed W. for immoral conduct; but on appeal to the synod, (the highest tribunal of that church,) the decision of the *classis* was reversed.

The *classis* afterwards passed various resolutions, at one time, declaring that W. should be considered as restored, and at another time, as deposed; but W., in the mean time, continued to exercise his ministerial functions as usual.

Held, that the decision of the synod, on the appeal, must be deemed conclusive, and that

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PLATT, J., delivered the opinion of the court. I am clearly of opinion that the justice decided right in rejecting the evidence offered to criminate Mr. *Wack*, the minister, as being a drunkard, &c. The only difficult question in the case is, whether Mr. *W.*, in the sense of the contract between the parties, has remained the regular minister of the Reformed Calvinist Church at *Canajoharie*. The answer *to this question will depend on the force and effect of the resolutions and decisions of the several ecclesiastical judicatories in relation to him. I do not profess to be very well informed on the subject; but I understand that there are three tribunals, acknowledged and established by the constitution of the *Reformed Dutch Church*, the *consistory*, the *classis*, and the *synod*; and that an appeal lies from the *consistory* to the *classis*, and from the *classis* to the *synod*. It appears, that Mr. *Wack* was tried at the *classis* of *M.*, and was deposed from the ministry by a resolution of that body; that he immediately appealed from that decision to the *synod*, which body reversed the decision of the *classis*. It appears that the *classis* of *M.* has ever since been agitated with the question; but, instead of instituting proceedings *de novo*, and citing Mr. *W.* to a new trial, they have, at one time, resolved that he should be considered as restored to his ministerial functions; and, at other times, have passed resolutions expressing their determination to consider him as deposed from the ministry. In the mean time, Mr. *W.* has uniformly continued to exercise his ministerial office and character. The proceedings and the return are somewhat confused and indistinct, but as far as I can understand them, the true history of the case is as I have stated it. My mind has been led to the conclusion, that the decision of the *synod*, on the appeal, must be deemed conclusive, and that, by virtue of that decision, Mr. *Wack* was restored to the ministry. The subsequent proceedings of the *classis* have been inconsistent and irregular; and no resolution or decision of a subordinate tribunal can impair the effect of the decision of the *synod* on the appeal. That decision of the highest tribunal must prevail, until, by instituting new proceedings, and procuring a new trial, the *classis* may again obtain jurisdiction over Mr. *W.*

My conclusion is, that the relation of minister and congregation was not dissolved, and that the defendant below was bound to pay the amount voluntarily subscribed by him. The judgment, therefore, must be affirmed.

Judgment affirmed.

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*ROBB against MONTGOMERY.

The defendant covenanted to pay the plaintiff 2500 dollars in instalments, to wit, 500 dollars in one year, 1000 dollars in two years, and 1000 dollars

THE plaintiff declared in covenant on an agreement, which the defendant, after craving *oyer*, set out. It was dated 12th of *June*, 1817. The defendant bound himself to pay the plaintiff 2500 dollars, to wit, 500 dollars, in one year from the date, 1000 dollars, in two years from the date, and 1000 dollars, in three years. The plaintiff, in consideration of the above payments being punctually made, at the times, and in the manner specified,

bound himself to convey, in fee simple, to the defendant, certain lots of land in the village of *Rochesterville*, particularly set forth in the agreement; and it was declared to be understood, that if the first payment was made when it became due, and the defendant wished to get a deed for the premises, and to give a bond and mortgage on the same, for securing the two last payments, *the plaintiff agreed to give a deed and take a mortgage. The deed was to be with warranty.

The declaration averred non-payment of all the instalments. The defendant first pleaded in bar, that when the first payment became due, the plaintiff was not capable, willing and ready to make, nor could he make, a title, in fee simple, to the defendant, for the said pieces of land mentioned in the agreement, according to the tenor and effect thereof. 2d. That after making the agreement, and before the time therein limited for the first payment, to wit, on, &c., the plaintiff bargained, sold and conveyed to one *James D. Bemis*, his heirs and assigns, in fee simple, all the said pieces of land mentioned in the said agreement, whereby the said *James*, when the first payment became due, became seised, in fee simple, thereof; by means whereof, the plaintiff was disabled from performing, and it became impossible for him to perform and fulfil the said agreement, on his part; for which reason the defendant declined and refused to perform, on his part, as he lawfully might.

Replication to first plea. That after making the agreement, and before the time therein stated and limited for the first payment, to wit, on, &c., at, &c., he, the plaintiff, for good and valuable consideration, assigned to one *James D. Bemis* all the interest of the plaintiff, in and to the articles of agreement, and the moneys thereby payable, and by deed, duly executed, conveyed to him, his heirs and assigns, forever, the lands mentioned in the agreement, whereof the defendant, at, &c., on, &c., had notice; and the said *Bemis*, at the time when the first payment became

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in three years; and the plaintiff, in consideration of the above payments being punctually made at the times, &c., covenanted to convey, in fee simple, to the defendant, certain lots of land; and the parties further agreed, that if the first payment was made when it became due, and the defendant wished to have a deed, and would give a bond and mortgage of the premises to be conveyed, to secure the two other instalments, that the plaintiff would then give a deed, with warranty, and take a mortgage. Before the time limited for the payment of the first instalment, the plaintiff sold and conveyed the land, in fee

simple, to *B.*, and assigned over to him the contract made with the defendant. In an action of covenant, to recover the instalments, the defendant pleaded the conveyance by the plaintiff, to *B.*, in fee, whereby the plaintiff became disabled from performing on his part; and the defendant, therefore, refused to perform on his part. The plaintiff replied, that at the time he sold and conveyed the premises to *B.*, he assigned over to him the articles of agreement with the defendant, and all the moneys thereby payable, of which notice was, on the same day, given to the defendant; and that when the first payment became due and payable, *B.* was capable, and willing, and ready to convey a good title, in fee simple, to the defendant, of the premises, of which the defendant had notice at the time, when the first payment became due. On a demurrer to the replication, because it did not aver that *B.* was ready and willing to give the defendant a warranty deed. Held, that the covenants were mutual and independent; that the defendant, in his plea, was bound to allege a demand of a deed from the plaintiff, and an offer or willingness to execute a bond and mortgage. That the contract was not rescinded on the part of the plaintiff; nor did he, by the conveyance of the land, and assignment of the contract to *B.*, incapacitate himself from performing the agreement; as *B.* was, in equity, a mere trustee for its performance, and might be compelled to perform it; and the plaintiff was not disabled from uniting with *B.*, if required to do so, in a warranty deed; or he might, if the defendant had shown himself entitled to such a deed, by an offer to pay the first instalment, and to give a mortgage, have procured a reconveyance from *B.*, and thus have been ready himself to execute a warranty deed to the defendant.

Where the covenants are dependent, the conveyance of the land, and the payment of the money, must be simultaneous; and there must be an existing capacity to convey, at the time, in the person who is to execute the conveyance; but where the covenants are independent, and the payment of the money is to precede the conveyance, it is no excuse for the non-payment of it, that the other party has not a present existing capacity to convey a good title, unless the party whose duty it is to pay the money, offers to do so, on receiving a good title; and then, the other party must give him a good title, or the contract will be rescinded. (a)

(a) *Sage v. Ranney*, 2 *Wendell's Rep.* 532. *Gould v. Allen*, 1 *Ibid.* 182. *Champion v. White*, 5 *Cow. Rep.* 509.

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due, was capable, and willing, and ready to make a title, in fee simple, to the defendant, for the said pieces of land, whereof the defendant, when the said first payment became due, to wit, on, &c., at, &c., had notice, with a verification.

There was a replication to the second plea: That after making the agreement, and before the time limited for the first payment, to wit, on, &c., at, &c., the plaintiff, for good and valuable consideration, sold, assigned and set over to *James D. Bemis*, all his estate and interest in and to the articles of agreement, and the moneys thereby payable, and on the same day, at, &c., the plaintiff granted, bargained, sold and conveyed to *the said *Bemis*, his heirs and assigns forever, all the said pieces of land mentioned in the agreement, whereof the defendant, on the same day and year aforesaid, at, &c., had notice; and the said *Bemis*, when the said first payment became due, was capable, and willing, and ready to make a title, in fee simple, to the defendant, for the said pieces of land, whereof the defendant, at the time when the said first payment became due, to wit, on, &c., at, &c., had notice; concluding with a verification.

There was a *rejoinder* to the replication to the first plea, that the said *James D. Bemis*, when the said first payment, mentioned in the said articles of agreement, became due and payable, was not ready to make a title, in fee simple, to the defendant, for the said pieces of land, in manner and form, as the plaintiff hath alleged, putting himself on the country, &c.

Demurrer to the replication to the second plea, assigning for cause, *that by the articles of agreement, the plaintiff was to give the defendant a warranty deed, for the said lots and pieces of land; and that there is no averment in the replication, that Bemis was willing and ready to give to the defendant such warranty deed. Joinder in demurrer,—which was submitted to the court, without argument, on the points and authorities stated.*

SPENCER, Ch. J., delivered the opinion of the court. It seems to me, there can be no doubt that the covenants here are mutual and independent. The defendant's covenant is absolute and positive, that he shall pay the 2500 dollars, in instalments; and in consideration of the payments being punctually made, at the times, and in the manner specified, the plaintiff bound himself to convey, in fee simple, the lots of land therein described. The payments were to be made without reference to the conveyance, and the conveyance was not to be given until all the payments were made. It is impossible for language to render covenants more independent than these. But the parties declare it to be understood, that if the first payment is made when it becomes due, and the defendant wishes to get a deed for the premises, and to give a bond and mortgage on the same, for *securing the two last payments, the plaintiff agreed to give a deed, which was to be with warranty, and to take a mortgage. This provision depended on two conditions—the payment of the first instalment of 500 dollars, and a demand thereafter, by the defendant, of a deed, with a proffer of a bond and mortgage, to secure the two

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last payments. Neither of the pleas set up the performance of the first condition, the payment of the 500 dollars; nor do either of them allege a demand of a deed, and an offer or willingness to execute a bond and mortgage. These were facts which were incumbent on the defendant to bring forward, the plaintiff being under no necessity to negative the demand for a deed, or to notice a circumstance depending wholly on the defendant's election. The only question, then, involved in the demurrer to the replication to the second plea is, whether the assignment of the agreement, and the conveyance of the lots, in fee, to *Bemis*, with averments of notice of such assignment and conveyance, to the defendant, before the first instalment fell due, and that he was capable, ready and willing to make a title, in fee simple, to the defendant, of the lots and pieces of land, specified in the agreement, with an averment, also, of notice of such capacity, willingness and readiness, to the defendant, before the first payment became due, is a bar to the plaintiff's recovery. It is insisted, that these matters are a bar to the suit.

The objections are, *first*, that it is not averred, that *Bemis* was ready and willing to give a *warranty* deed; *second*, that the defendant was entitled to a warranty deed from the plaintiff, and was not bound to take one from any other person; and, *third*, that, the plaintiff having disabled himself from conveying, the contract was rescinded, and he was not entitled to recover. The defendant not having availed himself of his right to demand a conveyance, when the first payment became due, in truth, the only question is, whether, by the plaintiff's assignment of the agreement and conveyance, in fee, to *Bemis*, the contract is rescinded. It is evident, from the facts set forth in the replication, that the plaintiff did not intend to rescind the contract. On the contrary, he assigned it, as a subsisting and beneficial contract, at the same time that he conveyed the lots to *Bemis*. **Bemis* accepted the assignment of the contract, and the conveyance of the lots, and immediately gave notice to the defendant of these facts; and of his readiness and willingness to perfect the contract; so that both the plaintiff and *Bemis* expected and intended to execute the contract, on their part. Nor can it be said, that the plaintiff was incapacitated from performing the agreement on his part. In the view of a court of equity, *Bemis* was a mere trustee for the performance of the contract. Under the facts in the case, he might be compelled to execute a deed to the defendant, when the latter entitled himself to one, by the payment of the purchase-money. And if the plaintiff's personal warranty was a valuable part of the contract, he had not disabled himself from uniting with *Bemis* in a warranty deed. The case of *Greenby v. Cheevers* (9 Johns. Rep. 126.) contains principles decisive of this case. The two cases are quite analogous. Here, as in that case, the covenants are independent; the defendant is willing to covenant to pay the whole consideration, and to receive the plaintiff's covenant to convey, when the consideration-money is fully paid, with an option and election to the defendant, to demand a conveyance after he had paid 500 dollars, the first instalment, on

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his giving a bond and mortgage on the lots to be conveyed, to secure the residue. But the defendant makes no election, nor does he pretend to show that he was ever ready to pay, or that he ever became entitled to a conveyance. On the contrary, he tacitly admits that he not only never paid any thing, but that he never offered to perform his part of the agreement. Had he come forward, ready and willing to perform his part of the contract, we are bound to presume, from the fact stated in the replication, that the plaintiff would have become capable to convey, as he had covenanted to do; for, in that event, if the defendant had been disinclined to accept a deed from *Bemis*, the plaintiff could have been reinvested in his title, and thus have been ready to execute a warranty deed. This I apprehend to be the justice and equity of the case; and I can entertain no doubt that the law is decidedly with the plaintiff.

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It is a mistake to compare this case with that of *Judson v. Wass.* (11 *Johns. Rep.* 525.) There, the giving the note, deed, bond and mortgage were all to be simultaneous acts; *in other words, the promises were dependent. Here, they are manifestly independent covenants. There, the plaintiff was utterly incapacitated from giving an indefeasible title, in consequence of the existence of a heavy mortgage on the premises, when the sale was made, and even down to the time of the trial. There, the contract was, that the plaintiff was capable of making a good and perfect title, at the time of the contract; here, the substance of the contract is, that he will make a good title when the defendant entitles himself to a deed, by the payment of the consideration-money. The case of *Tucker v. Woods* (12 *Johns. Rep.* 190.) is open to the same observations. The contract, independently of its being a mere proposition towards a contract, contained promises which were dependent, and both parts were to be executed at the same time; and there, as the plaintiff was incapacitated from conveying as he had agreed to convey, the defendant was rightly held not to be bound.

I consider the distinction to be clearly settled between dependent and independent covenants or promises. In the first case, the conveyance and payment are to be simultaneous acts, and there then must be an existing capacity in the one who is to convey, to give a good title; in the other case, where the payments are to precede the conveyance, it is no excuse for non-payment, that there is not a present existing capacity to convey a good title, unless the one whose duty it is to pay, offers to do so, on receiving a good title, and then it must be made to him, or the contract will be rescinded. Here, the defendant never offered to pay, and never demanded a conveyance; and, therefore, it furnishes no bar to the suit, that, at a certain period, the plaintiff had not the title. He might have had it, and would have had it, if the defendant had paid the money and demanded a deed.

Judgment for the plaintiff.

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TAYLOR

V.

WILLIAMS.

*D. TAYLOR against O. and J. WILLIAMS.

IN ERROR, on *certiorari* to a justice's court.

O. and J. Williams brought an action of debt against Taylor, in the justice's court. Taylor pleaded his discharge under the insolvent act of April, 1813. The discharge was dated December 22, 1818. The plaintiffs replied, that the discharge was fraudulent and void, because the consideration of Taylor's debts was not specified and clearly set forth in his inventory, according to the provisions of the act of the 28th of February, 1817, (sess. 40. ch. 55.) (a) which requires that the insolvent debtor "shall specify and set forth clearly the true cause and consideration upon which each and every of the said debts were contracted; and if the said debtor shall not give a true account of the consideration of the said debts, or any of them, he shall not be discharged; and if the said debtor shall have obtained his discharge, it shall, in such case, be adjudged fraudulent and void." The specification objected to, in this case, as defective, was in the following words: "Due Jonathan Taylor, of Batavia, Genesee county, four hundred dollars: the consideration of which was money lent by the deponent to the said insolvent; money paid for him at his special instance and request, and work and labor done and performed for him, at his special instance and request."

If the specification of the cause and consideration of the debts due and owing by an insolvent debtor, set forth in his inventory, pursuant to the act of the 28th of February, 1817, (sess. 40. ch. 55.) (a) fairly apprises the creditors of the general ground of indebtedness, so as to give them a clue to inquiry, it is sufficient. (b)

The justice gave judgment for the plaintiffs.

The only question was as to the sufficiency of the specification.

Per Curiam. The defendants in error contend, that the statute of the 28th of February, 1817, (sess. 40. ch. 55.) (a) ought to receive the same construction as the act (sess. 41. ch. 25.) requiring specifications on judgments by confession. We think, however, that there is ground for a different construction. There is some difference in the phraseology of the two statutes; and there is some difference, also, in the reason of the case. In the case of insolvency, the inventory and specification of debts are preliminary, and the opposing creditor has his day to investigate and oppose, at the hearing before the judge. But it is quite otherwise in the case of a judgment entered up by confession, on a warrant of attorney. If the specification, in the former case, is such as fairly to apprise the creditors of the general ground of indebtedness, so as to give them a clue to inquiry, it seems to us to be sufficient. It might lead to fraud, on the part of creditors, if they were permitted to lie by, and not oppose the discharge; and then, after the debtor has acquired a new credit, fall upon him, and strip him of property with which new creditors may have intrusted him. There are many exceptions which ought to be allowed, if made by the creditors at the hearing, before the discharge is granted, which ought not to be listened to afterwards. If it were not so, there would be no use, in fact, of the previous notice and hearing;

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(a) 2 Rev. Stat. 16.

(b) *Slidell v. M'Crea*, 1 *Wendell's Rep.* 156. *Reed v. Gordon*, 1 *Cow. Rep.* 51.

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for a wary creditor would not urge his objections until after the discharge, when it would be impossible to amend the specification, or obviate the objection.

The judgment of the court below must be reversed.

Judgment reversed.

THE PEOPLE, *ex. relat.* WILLIAM ARMSTRONG, *against* THE
COURT OF COMMON PLEAS OF THE COUNTY OF ONEIDA.

A Court of
Common Pleas
has no power
to grant a writ
of error *coram*
nobis.

IN May, 1821, *William Armstrong* obtained a judgment, in the Court of Common Pleas of the county of *Oneida*, against *Adam Rutt* and *Lewis Putnam*, on a *cognovit actionem*. *Rutt*, one of the defendants, was an *infant*; and a writ of error, *coram nobis*, was issued, returnable in *September*, 1821. In *March*, 1822, the Court of Common Pleas gave a judgment of reversal, by default. At the return of the writ, a motion was made to quash it, on the ground of informality, which was denied.

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In *January* term, a rule to show cause why a writ of *prohibition should not be granted, directed to the Court of Common Pleas, was obtained.

E. Griffin now showed cause :

1. Courts of Common Pleas have, by the statute, power to grant new trials. (Sess. 36. ch. 65. s. 3. 2 *N. R. L.* 141.) They have, also, power to issue original writs. (Sess. 38. ch. 38.)

The power to grant new trials includes the power to issue writs of error *coram nobis*. There is no method of reversing an erroneous determination of *facts*, but by an *attaint*, or a new trial. (3 *Bl. Com.* 307.)

A writ of error lies in the same court in which the judgment was given : 1. Where the error was not for any fault in the court, but for some defect in the process ; 2. For a default of continuance ; 3. For a default in adjudging execution ; and, 4. For an error of *fact*. (2 *Sell. Pr.* 363. 2 *Tidd's Pr.* 1056. *Dyer*, 196. a. 1 *Sid.* 208. *Com. Dig.* tit. *Pleader*, 3 B. 1. 1 *Lev.* 149. 3 *Salk.* 147.) It is beneath the dignity of a superior court to revise errors of fact. (3 *Salk.* 145.)

Lynch, contra. A writ of *prohibition* is the common law remedy where there is an encroachment or excess of jurisdiction in an inferior court. (3 *Bl. Com.* 111. 2 *Sell. Pr.* 308. 2 *H. Bl.* 100.) The Courts of Common Pleas of this state are courts of inferior and limited jurisdiction, created by statute, having power to try actions personal and mixed, and to grant new trials ; but nothing more. All their process must be returnable in term. By a late statute, (sess. 38. ch. 38.) they may issue original writs for the commencement of actions within their jurisdiction, but in no other cases. These courts are always subject to the general superintending jurisdiction of this court ; (1 *Johns. Cas.* 179, 180.) and

without the provision of the statute, they could not even grant a new trial. In *England*, a writ of error, *coram nobis*, has no particular return. And a Court of Common Pleas of this state cannot devise a new writ conformably to the statute, requiring a precise return. That power belongs to the Court of Chancery; (1 *N. R. L* *487.) and, by the late statute, to this court. Now, process without a return, or returnable out of term, is a nullity. (2 *Johns. Rep.* 190. 9 *Johns. Rep.* 386.) This court will take cognizance of an error of fact, as well as an error of law, in an inferior court. (*Arnold v. Sandford*, 14 *Johns. Rep.* 417.)

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Per Curiam. Courts of Common Pleas are creatures of statute, and, in every sense, inferior courts. They have no power, except by statute, to grant new trials. They cannot entertain a writ of error *coram nobis*, nor a writ of error of any description. (*Arnold v. Sandford*, 14 *Johns. Rep.* 417.) The rule must be made absolute.

Rule absolute.

HUDSON *against* E. and J. SWIFT.

THIS was an action of *assumpsit*, tried at the *Cayuga* circuit, before Mr. Justice *Van Ness*. The declaration contained the common counts.

The plaintiff gave in evidence articles of agreement executed by the parties, under their hands and seals, dated the 10th of *August*, 1819, by which the defendants agreed to sell and convey to the plaintiff, "by a good and sufficient warranty deed, ten acres of land, adjoining the land of *Elijah Miller* on the south and west on the road leading from *Auburn* to *Grover's* settlement, running north along the said road twenty-eight rods, then in an eastern direction, in a square form, far enough to contain ten acres of land; the said deed to be given within ninety days from the date" of the agreement: "Provided, the said *E. D. Hudson* shall pay, or cause to be paid, unto the said *E. S.* and *J. S.* the sum of nine hundred dollars." The plaintiff paid to the defendants 350 dollars, which was endorsed on the agreement, the 10th of *August*, 1819.

D. Horner, a witness for the plaintiff, testified, that he *was a surveyor, employed by the defendants to run out the ten acres of land mentioned in the agreement; that, on the 8th of *November*, 1819, he went with the plaintiff and defendants on the land, with a view of setting off the ten acres; that he run lines along the road, when a dispute arose between the parties as to the south-west corner of the ten acres. The defendants offered to give a deed according to the terms of the contract, and as the land was therein described; but as the contract was then in the hands of *J. Grover*, the parties agreed to put off the business until the next day. During the conversation between the parties, the plaintiff stated to the defendants, that he had already paid to them 350

To entitle a purchaser to recover back part of the consideration-money, paid on a contract for the purchase of land, he must show that he has tendered the residue of the purchase-money, and demanded a deed, so as to put the vendor in default. (a)

Whether the purchaser must not prepare and tender the conveyance to be executed by

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the vendor?
Quære.

(a) *Green v. Green*, 9 *Cow. Rep.* 46. *Fuller v. Hubbard*, 6 *Ibid.* 13.

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dollars, on the contract, and was ready to pay the balance, whenever they would give him a deed according to the contract; and the defendants replied, that they were willing, and offered to give such a deed. The witness understood, from what passed between the parties, on the 8th of *November*, that they agreed, if the defendants executed and tendered a deed on the 10th of *November*, for the ten acres of land, according to the intention of the parties, as expressed in the contract, that the plaintiff would accept of it. It was proved, that a deed, duly executed and acknowledged by the defendants, dated the 9th of *November*, 1819, was, on that day, tendered to the plaintiff, who refused to accept it, saying, that he would have nothing to do with it, unless it was made out according to the contract, and that the defendants were endeavoring to make him take half the road, and part of *J. Miller's* land.

Oakley, for the plaintiff, contended, that the covenants were mutual and dependent, and that their performance must be simultaneous. It is a contract to convey, on the payment of money, or a certain day, and it expired on the 8th of *November*. (*Jones v. Gardner*, 10 *Johns. Rep.* 266. *Judson v. Wass*, 11 *Johns. Rep.* 525. 4 *Term Rep.* 761.) The time of performance cannot be extended by parol. (*Hasbrouck v. Tappan*, 15 *Johns. Rep.* 200.)

Again; under the circumstances of the case, the plaintiff had a right to consider the contract at an end, and to bring his action to recover back the money he had paid. There was a mutual abandonment of the contract. It is unjust and inequitable for the defendants to retain the money which has been paid to them on the contract. (7 *Johns. Rep.* 125. *Doug.* 688. 1 *Caines's Rep.* 67.)

Admitting, even, that there was a tender of a conveyance in time; yet the deed was not according to the contract. The description of the premises was defective; and the right of the wife was not conveyed by a sufficient acknowledgment. It should have been certified that her examination was *private*, as well as separate and apart from her husband.

Richardson, and *E. Williams*, contra. There was no covenant at all on the part of the plaintiff. The defendants covenant to convey the land, within ninety days, provided the plaintiff paid them a certain sum. It was a conditional agreement to sell. An action would not lie on the implied covenant. The defendants offered to perform on their part, at the day fixed by the agreement. Payment of the money by the plaintiff was a condition precedent, to be performed, at least, at the day on which the defendants were to convey. The plaintiff was bound to show a payment of the money, or a tender of it. Before he can rescind the contract, or call on the defendants to perform, he must have fulfilled, or offered to fulfil, his part of the agreement.

If the covenants were mutual and dependent, it would be enough for the defendants to say, that, before the day of performance arrived, the time was extended by parol. (*Fleming v. Gilbert*, 3 *Johns. Rep.* 528.) The acknowledgment endorsed on the deed

was sufficient. It is in the language of the act. The words, *separate and apart from her husband*, imply a private examination.

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Oakley, in reply, said, that if the plaintiff had an option to perform the contract, or not, he might rescind it at any time. The words of the act concerning deeds, (1 N. R. L. 309. sess. 36. ch. 97.) as to their execution by married women, are, "that no estate of a *feme covert*, &c. shall pass by her deed, &c., without a previous acknowledgment, &c., *made by her on a private examination, apart from her husband*," &c.

*SPENCER, Ch. J., delivered the opinion of the court. The plaintiff seeks to recover back 350 dollars, paid by him to the defendants, on the 10th day of August, 1819. On that day, the parties entered into an agreement, under their hands and seals, whereby the defendants covenanted to convey to the plaintiff ten acres of land, therein mentioned, by a good and sufficient warranty deed, which was to be given, within ninety days from the date of the agreement, provided the plaintiff should pay the defendants nine hundred dollars. The sum sought to be recovered, was paid as part of the consideration-money. It is very clear, from the case, that the agreement has not been rescinded by the consent of the parties. On the contrary, the defendants have professed to be always ready to fulfil it. It is equally clear, that the covenants were dependent; and the payment of the money was an act to be done concurrently with the giving of the deed. Had the plaintiff brought his action on the covenant, it would have been incumbent on him to aver and prove an offer to pay the residue of the consideration. (2 Johns. Rep. 207. 12 Johns. Rep. 212.) The plaintiff's situation is not changed by suing for the money paid. He was bound to show that the contract was rescinded, or that he stood ready, and offered to pay the balance due, on the day limited for the performance of the agreement; and it does not appear that the plaintiff put himself in a condition to demand a deed. (9 Johns. Rep. 127. 12 Johns. Rep. 274.) *Sugden*, in his *Law of Vendors*, p. 162, sums up the law upon this subject, with accuracy and precision. "Thus," he says, 'a vendor cannot bring an action for the purchase-money, without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing; and, on the other hand, a purchaser cannot maintain an action for breach of contract, without having tendered a conveyance and the purchase money.' To entitle the purchaser to recover back a deposit, or part of the consideration-money paid in advance, he must put the vendor in default, by tendering the money, and demanding a conveyance. I will not say, because it is unnecessary to this case, that the purchaser must tender the conveyance, though I apprehend that such is the law in *England*. Although the plaintiff is remediless *here, if he chooses to go on with his purchase, he must resort to another forum.

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Judgment for the defendants. (a)

(a) Vide *Robb v. Montgomery*, ante p. 15.

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Labor or service voluntarily done and performed by the plaintiff, for the defendant, without his privity or request, however meritorious or beneficial it may be to the defendant, as in saving his property from destruction by fire, affords no ground of action. (a)

BARTHOLOMEW against JACKSON.

IN ERROR, on *certiorari* to a justice's court. *Jackson* sued *Bartholomew* before a justice, for work and labor, &c. *B.* pleaded *non assumpsit*. It appeared in evidence, that *Jackson* owned a wheat stubble-field, in which *B.* had a stack of wheat, which he had promised to remove in due season for preparing the ground for a fall crop. The time for its removal having arrived, *J.* sent a message to *B.*, which, in his absence, was delivered to his family, requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. The sons of *B.* answered, that they would remove the stack by 10 o'clock the next morning. *J.* waited until that hour, and then set fire to the stubble, in a remote part of the field. The fire spreading rapidly, and threatening to burn the stack of wheat, and *J.*, finding that *B.* and his sons neglected to remove the stack, set to work and removed it himself, so as to secure it for *B.*; and he claimed to recover damages for the work and labor in its removal. The jury gave a verdict for the plaintiff for 50 cents, on which the justice gave judgment, with costs.

PLATT, J., delivered the opinion of the court. I should be very glad to affirm this judgment; for though the plaintiff was not legally entitled to sue for damages, yet to bring a *certiorari* on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant; and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it, therefore, forms no ground of action. The judgment must be reversed.

Judgment reversed

(a) Vid. *Mumford v. Brown*, 6 Cow. Rep. 475. *Rensselaer Glass Factory v. Reid*, 6 Ibid. 587. 620.

P. and J. HOLMES against TREMPER.

A cider mill and press, erected by a tenant, holding from year to year, at his own expense, and for his own use, in making the cider on the farm, are not fixtures, but personal property, belonging to the tenant, who may remove them, at the expiration of his tenancy; and if he enters on the land, after the expiration of the term, and removes them, though he may be liable, as a trespasser on the soil, and for breaking the close, yet the property in the cider mill and press is not changed, but remains in the tenant. (a)

REPLEVIN for a cider mill and cider mill press. *Avowry*, that the place in which, &c. is a certain farm of seventy acres, in *Kings-ton*, &c., whereof the defendant had been possessed for six years immediately antecedent to the 9th of May, 1820, as the tenant, from year to year, of *Jacob I. Tremper*, who was, at the first let-

(a) Vid. *Raymond v. White*, 7 Cow. Rep. 319. *Miller v. Plumb*, 6 Ibid. 665. *Cresson v. Stout*, 17 Johns Rep. 116.

ting thereof, seised in fee; and whilst such tenant, and long prior to said 9th of *May*, to wit, on the 1st of *May*, 1818, the defendant, at her own expense, and for her own use, built the said mill and press, and used the same for making the cider on said farm, during her tenancy; and at the expiration of her tenancy, on the said 9th of *May*, when moving from the said farm, she removed the said mill and press, as, &c., without this, that the said mill and press, at, &c., were in the said plaintiffs.

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Plea: that, prior to said 9th of *May*, the time of taking said cider mill and press, to wit, on the 1st of *May*, 1820, one *J. Hasbrouck* was seised in fee of the farm, &c., mentioned in the avowry, by title derived from the said *J. I. Tremper*, by sundry conveyances, and the said cider mill and press were, at the time when said *Hasbrouck* became seised of the said farm, and before the time of taking thereof, erected and standing upon, and annexed to, and parcel of the said farm, and so remained at the time of taking thereof, as aforesaid; and the said *Hasbrouck*, being so seised, and before the same was taken as aforesaid, on the first day of *May*, 1820, at, &c., demised the said farm, with the appurtenances, to the said plaintiffs, to hold the same for two years from the 1st of *May*, 1820; by virtue of which said demise, they, before the taking said mill and press, to wit, on the 1st of *May*, 1820, entered into said farm, and were possessed thereof, &c. &c.

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There was a *demurrer* to the plea, and joinder; and the same was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. The question arising upon the pleadings has never been decided in this court. The case of *Bradley v. Osterhout* (13 *Johns. Rep.* 404.) was between the purchaser and the vendor of a farm. The breach of covenant assigned was, that, after making the covenant, and before the deed was given, the vendor removed from the premises a cider mill, which was averred to be annexed to the freehold, and a part of the farm. The defendant pleaded that he had conveyed the farm, &c., to which the plaintiff demurred. The plea was adjudged to be bad, because it did not answer the breach assigned, and because, whether the covenant to convey the farm would embrace the cider mill, would depend on circumstances; and that, as the declaration averred that it was annexed to the freehold, and made part of the farm, the plea should have answered that breach. The case of *Hermance v. Vernoy* (6 *Johns. Rep.* 5.) was decided on peculiar circumstances, and did not profess to examine the question of fixtures, as between landlord and tenant. When a farm is sold, without any reservation, the same rule would apply, as to the right of the vendor to remove fixtures, as exists between the heir and executor; and it is not now necessary to discuss that branch of the law.

It is admitted, in this case, that the defendant erected the cider mill and press, at her own cost, during her tenancy, for the purpose of making the cider on the farm. I confess, I never could perceive the reason, justice or equity of the old cases, which gave to the landlord such kind of erections as were merely for

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the use and convenience of the tenant, the removal of which neither defrauds nor does the least injury to the landlord. The rule anciently was very rigid; but I think it has yielded materially to the more just and liberal notions of modern times. In *Lawton v. Lawton*, (1 Atk. 13.) the question arose between the tenant for life and a remainder-man. The subject of controversy was a fire-engine, *set up by the tenant for life, for the benefit of a colliery; and the point was, whether it should be considered as personal estate. It appeared, that, in building sheds for securing the engine, holes were left for the ends of timber, to facilitate removal, and they were capable of being removed. Lord *Hardwicke*, after observing that the rigor of the law was relaxed upon this subject, pronounced it a mixed case between enjoying the profits of the land, and carrying on a species of trade. He adverted, with evident approbation, to a decision of Chief Baron *Comyns*, at the assizes at *Worcester*, in which the subject of discussion was a cider mill, and the question was between the executor and the heir. In that case, it was decided, that though cider is part of the profits of the real estate, yet it was personal estate, notwithstanding, and should go to the executor. Lord *Hardwicke*, in the principal case, decided, that the fire-engine was personal estate; and he makes a very strong distinction between the rights of a tenant from year to year, as between him and the landlord, and between a tenant for life and remainder-man. In *Lawton v. Salmon*, (1 H. Bl. 259, in the notes,) Lord *Mansfield* stated the change that had taken place in the law, as between landlord and tenant. He observed, that many things may now be taken away which could not be formerly; such as erections for carrying on any trade, marble chimney-pieces, and the like, when put up by the tenant. This, he adds, is no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefited.

In the case of *Culling v. Tufnal*, before *Treby*, Chief Justice, in 1694, (Bull. N. P. 34.) the tenant had erected a barn on the premises, and put it on *pattens* and *blocks*, but not fixed in, or to the ground, and removed it off; he was held to be justified, because it was usual to remove such buildings in that part of the country. But *Buller* states, that the question would now be determined in favor of the tenant without difficulty, for that, of late years, many things are allowed to be removed by tenants, which were not formerly; and he specially instances cider mills, which the tenant may now remove. In *Dean v. Allalley*, (3 Esp. Rep. 11.) Lord *Kenyon* held, that the law would make the most *favorable construction for the tenant, where he had made necessary and useful erections, for the benefit of his trade or manufacture; and he said it had been held so, in case of cider mills, and in other cases; and he should not narrow the law, but hold erections of that sort, made for the benefit of trade, (or constructed as the sheds were in that case,) to be removable at the end of the term. In the case of *Elwes v. Maw*, (3 East, 38.) the buildings erected by the tenant, and which he removed, were of brick and mortar, and tiled, and the foundations were one foot and a half deep in the

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ground; and Lord *Ellenborough* said, that these were fixtures, and not removable, as between landlord and tenant. This case does not call for any expression of our opinion on the correctness of that decision, nor do we intend to approve or disapprove of it. It is very materially different from the present case. Lord *Ellenborough* refers to the decision of Chief Baron *Comyns*, in the case of the cider mill; he says, he may have considered it a mixed case, between enjoying the profits of the land, and carrying on a species of trade, and as considering the cider mill as properly an accessory to the trade of making cider; and I can see no good reason why it may not thus be considered, for cider is an article of trade. He refers, also, to the case before Chief Justice *Treby*, and admits that the tenant might remove the barn on pattens and blocks; for, he says, they were not fixed in or to the ground, and so they were not fixtures.

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The plea here states, that the mill and press were annexed to, and parcel of, the farm; but it does not state how they were annexed; whether the mill was let into the ground or not. It states a mere matter of law, and not of fact. But it is immaterial whether the mill was let into the ground or not. The tenant, in my judgment, had an unquestionable right to remove it, as personal property.

The plaintiff's counsel supposes that the tenant could not remove this mill after the end of the term. It is true, that if she entered upon the plaintiff's possession, and took away the mill, she would be a trespasser on the soil, and answerable for breaking the close; but leaving the mill there, if it belonged to her, would not work any change of the property; and in this action, the trespass for entering on the premises is not in question; and when it is said that the removal must be within the term, or else he will be a trespasser, it means only a trespasser as regards the entry.

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Judgment for the defendants.

TROUP against The Executors of SMITH.

THIS was an action of *assumpsit*, brought against the executors of *John Smith*, deceased. The declaration contained five counts: The first count stated, that the plaintiff, being seised of a township of land, in the town of *Ossian*, county of *Alleghany*, and being desirous of having the same surveyed into lots of convenient size, for the purpose of enabling him to sell the same with exact-

In an action of *assumpsit* for negligence, want of skill and fraud, in the performance of work, the defendant pleaded the statute of limitations.

tations: *Held*, that the plaintiff cannot reply a fraudulent concealment of the badness of the work by the defendant, so that the plaintiff did not discover the fraud until within six years before the commencement of the suit, so as to deprive the defendant of the protection of the statute.

Though a replication must not depart from any material allegation in the declaration, yet where the plea is evasive, the plaintiff may avoid the effect of it, by restating his cause of action with more particularity and certainty; and thus meet and thwart the particular defence set up. (a)

Though an action will not lie against executors or administrators, for a fraud of the testator, which does not benefit the assets; yet it will lie against his representatives, on a contract fraudulently performed by him.

(a) Vide *Leonard v. Pitney*, 5 *Wendell's Rep.* 30. *Bank of Utica v. Childs*, 6 *Cow. Rep.* 238.

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ness and certainty, to settlers desirous of purchasing lots, and also to convey the same to purchasers, with accuracy and certainty; the testator, in his life-time, being a surveyor of land, and following the business and occupation of a surveyor of land, on the 10th of *May*, 1816, at *Bath*, in the county of *Steuben*, in consideration that the plaintiff, at the special instance and request of the testator, in his life-time, had then and there retained and employed him, in the way of his said occupation and business of a surveyor of land, (supposing, always, that he would act in a skilful and faithful manner,) to survey the said township of land into lots of convenient size; to enable the plaintiff to sell the same with accuracy, &c. And also to make and deliver to the plaintiff, particular, accurate and true field-notes of the said survey; and also to make and deliver to the plaintiff a particular, exact and true map of the said township, and of the several lots composing the same, to be founded on, and conformable to the said survey, for a reasonable reward, to be therefor paid by the plaintiff to *the testator. He, the testator, being such surveyor, then and there, &c., undertook and faithfully promised the plaintiff, to survey, in a skilful and faithful manner, and with accuracy, exactness and certainty, the said township of land, into lots of convenient size, &c.; and also to make and deliver to the plaintiff, particular, accurate and true field-notes of the said survey; and also to make and deliver to the plaintiff, a particular, exact and true map, &c., within a reasonable time, &c. Nevertheless, the testator, *John Smith*, not regarding his said promises, &c., did not perform the same in a skilful and faithful manner, &c.; but, on the contrary, performed the same in a grossly unskilful and unfaithful manner, that is to say, by neglecting to survey and mark all the lines of each of the said lots, to ascertain and fix with precision the quantity of land contained in each of the said lots, to prevent the lines of the said lots from encroaching upon, and interfering with each other; to state with accuracy and truth, the kind and quantity of all the timber, the kind and quality of the soil of each of the said lots; and to state with truth, and also to delineate and lay down with accuracy, on the map of the said township, all the streams of water running in and through the said several lots, or parts thereof, with the several mill-seats thereon; whereby the said survey of the said township, by the said *John Smith*, was rendered so grossly deficient in truth and accuracy, as to be entirely unfit and unsafe for the use of the plaintiff; which caused the said survey of the said township to be wholly useless and unprofitable to the plaintiff, and thereby put and subjected him to very great loss and damage, not only by being long hindered and delayed in the sale of divers of the said lots, to settlers, who were willing to purchase the same, &c., but also, by being forced to pay, lay out, and expend, a large sum of money, to wit, 1500 dollars, in procuring a particular, accurate, exact and perfect survey of the said township, to be performed and made by another surveyor, having competent skill, diligence and integrity, for that purpose, &c. The plaintiff then alleged, that he, afterwards, on the 16th of *December*, 1816, paid to the testator, in his life-time, the sum of 1500 dollars, as a rea-

sonable reward for his services, in performing and making the said survey, &c.; and *which sum the testator received in full satisfaction for the same; by reason whereof, &c.

The second, third and fourth counts were also special; the *fifth* count was for money lent, money paid, and money had and received, &c. and an *insimul computassent*, &c.

The defendant pleaded, 1. *Non assumpsit*; 2. *Actio non accrevit infra sex annos*; 3. *Plene administravit*. The plaintiff replied to the second plea as to the first count, that he ought not, by reason of any thing in that plea alleged, to be barred, &c., because, he said, that the said *John Smith*, the testator, in his life-time, surveyed the said township of land fraudulently and deceitfully, in this, that he did not run and mark some of the lines between many of the lots, in any manner whatsoever; that some of the lines, in many of the lots, were so badly and imperfectly run and marked, that the same could not be traced; that some of the lines, of many of the lots, interfered with, and intersected each other; that the courses of many of the lots were not marked or designated by any monuments whatever; and that others were, otherwise, so badly and unskilfully marked, that the quantity of land contained in some of the lots was not ascertained and fixed with exactness; and that some of the streams of water running in and through the several lots, with the mill-seats thereon, were not delineated and laid down on the map of the said survey: from all which causes, the said survey became useless and unprofitable to the plaintiff. And further, that at, and immediately before the payment, by the plaintiff, of the said sum of 1500 dollars, to wit, on the 30th of *December*, 1816, the said *John Smith*, fraudulently and deceitfully, showed and delivered to the plaintiff, certain false and incorrect field-notes, maps or plats of the said survey of the said township, from which it appeared that the said survey had been performed in a good, skilful, sufficient and workmanlike manner, according to the true intent and meaning of the promise and undertaking of the said *John Smith*. And further, that the said township of land, at the time of the survey thereof, consisted of land in a state of nature, and was covered with timber, trees and underbrush, and that by reason thereof, and of the said false and incorrect field-notes, maps and plats, purporting, nevertheless, *to be true and correct, &c., the said fraud and deceit were not discovered by the plaintiff, until a long time after said contract was to be performed, and after parts of the said township had been contracted to be sold by the plaintiff, to settlers, to wit, on the 1st of *May*, 1818, &c.

There were also several replications to the same plea, as to the second, third and fourth counts, which were substantially the same as to the first.

There was a *general demurrer* to the replications.

J. C. Spencer, in support of the demurrer, contended,

1. That the replications were a departure from the declaration. (1 *Chitty's Pl.* 618, 619.)

2. That the replications were double, inconsistent, contradictory and uncertain.

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3. That the matter of excuse set up in avoidance of the plea of the statute of limitations, was insufficient, and no answer to the plea. The plaintiff does not say that the cause of action did not accrue until within six years, but merely that he did not discover it until within that time.

4. That the action, sounding in *tort*, died with the testator, and did not survive against his executors. (1 *Johns. Rep.* 403. *Cowp.* 371. 1 *Com. Dig.* 172. 196. 1 *Morgan's Vade Mecum*, 276.) It is an action for *deceit*, and *not guilty* would have been a proper plea. (Lord *Raym.* 973. 1 *Caines*, 124.) An action of debt for an escape does not lie against the executor of a deceased sheriff. Though the form of this action be *assumpsit*, yet it is, in substance, for a *tort*. It is an exception to the general rule as to actions of *assumpsit*. Where things imply a wrong in themselves, or any misfeasance, the rule applies, *actio personalis moritur cum persona*. (*Baily v. Butler*, T. *Raym.* 72.)

Butler, and *Talcot*, (A. G.) contra, insisted, 1. That the action would lie against the executors. Anciently, the maxim *actio personalis moritur cum persona* was applied to almost all actions *ex contractu*, in which a wager of law was allowed. But for the last two centuries, in *England*, more liberality has prevailed, and every action arising *ex contractu*, or where *assumpsit* is a proper form, survives against *executors. (1 *Chitty's Pl.* 92, 93. 2 *Chitty's Pl.* 94. *Morgan's Prec.* 84. 3 *Went. Plead.* 322. 384. 389. 2 *Bac. Abr.* tit. *Executors*, &c. P. 2. *Toller's Law of Executors*, 352.) An action may arise *ex contractu*, yet partake of a *tort* or *delictum* in the breach of it; and though an action for a *deceit* would lie, yet the plaintiff may waive the *tort*, and bring *assumpsit*. (1 *Chitty's Pl.* 90. 99. 132. 138, 139. 3 *Dallas*, 357. 15 *Johns. Rep.* 475.) An action on the case will lie, and so will *assumpsit*; and the latter is now considered as the most appropriate remedy. (9 *Co.* 89. a. Sir T. *Raym.* 71. *Saville's Rep.* 40. *Cro. Car.* 539.) In *Hambly v. Scott*, the cases were fully examined, and Lord *Mansfield* laid down, in the clearest and most satisfactory manner, a just and equitable rule on this subject. (*Cowp.* 371. 377. 1 *Chitty's Pl.* 56, 57.) In *Utterson v. Vernon*, (3 *Term. Rep.* 549.) Lord *Kenyon* recognizes the distinction taken by Lord *Mansfield*, that where a person is guilty of a *tort*, as by cutting down trees, and then dies, no action lies against his representatives, for *damages* arising from the tortious act; though the *value* of the timber may be recovered out of his assets. (1 *Saund.* 216, 217. n. 1.)

Again: a bill in equity may be filed against an *executor*, for a *fraud* committed by his testator. (3 *Atk.* 757. 1 *Madd. Ch.* 205.) And there is, as was observed by Lord *Mansfield*, a great analogy between this action of *assumpsit* and a bill in equity.

Again: in *Harison v. Walker*, (*Peake's Cas.* 111.) where *B.*, a bankrupt, had received money on a bill which he had fraudulently obtained from *A.*, and afterwards a commission of bankruptcy issued against him, Lord *Kenyon* held, that *A.* might recover back the money from the assignees of *B.*, in an action of *assumpsit*;

yet the assignees of a bankrupt are no more liable for the *torts* or *frauds* of the bankrupt, than executors are for the torts of their testator.

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2. The *replication* is not a departure from the declaration. Where a plea is *evasive*, the plaintiff may avoid the effect of it by *restituting* the cause of action, or by a new assignment. (1 *Chitty's Pl.* 602. *Shippey v. Henderson*, 14 *Johns. Rep.* 178. 180.) In the case of the *First Mass. Turnpike Company v. Field*, (3 *Mass. Rep.* 201.) it was decided, that a fraudulent concealment by the defendant, that a cause of action had accrued to the plaintiff, was a good replication to a plea of the statute of limitations.

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3. Nor is there any duplicity or uncertainty in the replication; but if there were, it cannot be taken advantage of on a general demurrer. (1 *Chitty's Pl.* 572, 573. 625, 626.)

4. But the great objection is, that the replication is no answer to the plea; or, in other words, that fraud will not take a case out of the statute of limitations. The statute ought to be strictly construed. If the plea in this case is to prevail, it is obvious that great injustice will be done. Fraud is not within the equity or spirit, nor within the terms of the statute. In the interpretation of the statute, it is fairly to be supposed that the legislature intended to except fraud from its protection. (*Vattel*; B. 2. c. 17. s. 282. 291. 299.) To permit a defendant who has by his own fraudulent concealment prevented the plaintiff from discovering his cause of action, to plead the statute in bar, would be repugnant to the clearest principles of law and equity.

The statute cannot be pleaded to a bill for the discovery of fraud, as length of time forms no bar, in such case. (1 *Madd. Ch.* 205. 3 *Atk.* 558. 2 *Ves. jun.* 280. 3 *Johns. Ch.* 216. 6 *Wheaton's Rep.* 293.) So, in the construction of the statute of frauds, a court of equity considers a *part performance* as taking a case out of the statute, and gives relief on the ground of *fraud*, in refusing to perform, after suffering a performance by the other party. (1 *Madd. Ch.* 300. 302. 14 *Johns. Rep.* 35.) Courts of law and equity have a concurrent jurisdiction in matters of fraud. The action of *assumpsit* is like a bill in equity. *Fraud* constitutes an exception to all general rules, and the party who is guilty of it, is not allowed to shelter himself under the general rule of law. (*Phillips's Evid.* 426. 428. *Doug.* 654. 4 *Yeates's Rep.* 109. 1 *Hayw. Rep.* 16. 2 *Hayw.* 129. 4 *Dessas. Rep.* 179, 180. 4 *Munf.* 444. 8 *Cranch.* 93. 3 *Mass. Rep.* 371. 3 *P. Wms.* 143. 13 *Vin. Abr.* 542. tit. *Fraud*, Z. pl. 3. *Fowler v. Hunt*, 10 *Johns. Rep.* 64. *Domat*, B. 3. s. 5. n. 9. 4 *Bro. P. C.* 163. *Cas. temp.* **Talb.* 61. 69. 2 *Sch. & Lef.* 631. 634. 1 *P. Wms.* 742. *Bull. N. P.* 150. *Str.* 907. 2 *Saund.* 117. *Willes*, 259. note. 3 *Bl. Com.* 309. note 9. *Bac. Abr.* tit. *Limitation of Actions*, D. 3.)

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J. C. Spencer, in reply. It is immaterial when the plaintiff discovered the fraud; for fraud, in a *court of law*, is not a good replication to a plea of the statute of limitations. In *Bree v. Holbeck*, (*Doug.* 654.) Lord *Mansfield*, to be sure, says, "There may be cases, too, which fraud will take out of the statute of limitations."

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But this is a mere *obiter dictum*. It was not a point decided in the case. The cases cited from chancery are those of trusts. *Sugden (Law of Vendors, &c. 241, 242. 2 Madd. Ch. 245.)* refers to them, to show that in equity the statute of limitations does not bar a *trust*, as between the parties. No matter whether there be fraud or not; the rule in equity is broad and general. The statute does not apply in cases of trusts. The statute is considered as not binding a court of chancery; but that court adopts it, as a reasonable rule, to be applied in analogous cases. (*2 Madd. Ch. 244.*) Will this court adopt this rule of equity, with all its consequences, and say, that the statute of limitations does not apply to any case of money lent or paid in trust? In *Hoveden v. Lord Annesley*, (*2 Sch. & Lefr. 631, 632, 633.*) Lord *Redesdale* examines the doctrine of courts of equity on this subject. He says, "Courts of equity are bound to yield obedience to the statute of limitations, upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. The statute must be taken virtually to include courts of equity; for when the legislature by statute limited the proceedings at law, in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law; and, therefore, it must be taken to have virtually enacted, in the same cases, a limitation for courts of equity also." "That wherever the legislature has limited a period for law proceedings, equity will, in analogous cases, consider the equitable rights as bound by the same limitation." And he states the qualifications and distinction as to the general principle that "trusts and *fraud are not within the statute." "If," says he, "a trustee is in possession, and does not perform his trust, his possession operates nothing in bar, because his possession is according to his title." "But the question of fraud is of a very different description; that is, a case where a person who is in possession by virtue of that fraud, is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a court of equity, founded on the fraud, and the possession, in the mean time, is adverse to the title of the person who impeaches the transaction on the ground of fraud." A court of equity does not impeach a transaction on the ground of fraud, where the fact of fraud was within the knowledge of the party, "within the period prescribed by the statute. But every new right of action in equity, that accrues to the party, on the discovery of the fraud, must be acted upon within that period." (p. 636.) If, then, the discovery of the fraud does not give a new right of action, it does not come within the principle of a court of equity; and if it does give a new right of action, then the replication is a departure from the declaration.

In *Cooth v. Jackson*, (*6 Vesey, 39.*) Lord *Eldon*, referring to the administration of justice in distinct courts of law and equity, in *England*, observed, that the character of the law of that country had suffered more by the circumstance of courts of law acting upon what they conceive to be the rules of equity, than from any other cause. A court of equity has its peculiar mode of proceeding, and its peculiar remedies. In equity, great weight is attributed

to the oath of the defendant; and if he denies the fraud, the testimony of a single witness is not sufficient to support a decree against it; though it would be enough for the plaintiff in an action at law.

In *Evans v. Bicknell*, (6 *Vesey*, 174. 182, 183.) Lord *Eldon*, in taking notice of the position of some of the common-law judges, in *Paisley v. Freeman*, and some other cases, that if there was relief in equity, there ought to be relief at law, observes, that it was a proposition excessively questionable, and he doubted whether it was not founded in pure ignorance of the constitution and doctrine of the Court of Chancery. The position of Mr. Justice *Buller*, in *Goodtitle v. Morgan*, (1 *Term. Rep.* 755.) that what has become a rule of property in a court of equity, ought to be adopted in a court of law, appeared to him to be a very hasty proposition.

As to the decisions by the courts of *Massachusetts* and *Pennsylvania*, it is to be observed, that in those states there are no courts of chancery, distinct from their common-law courts. In the case of *The Massachusetts Turnpike Company v. Field, &c.*, there was, in fact, a fraudulent concealment on the part of the defendants, which was the sole cause of the delay in bringing the action. In the present case, there was no such concealment. There was no act whatever on the part of the defendants which prevented the plaintiff from discovering the cause of action. His only excuse for not discovering it sooner, is, that his land was in such a wild state, and so covered with timber and trees, that the fraud of the defendants could not be discovered. Could the plaintiff, after suffering his land to remain in that state for fifty years, bring his action for a fraud in the survey, and reply this matter as an excuse for the delay? Chief Justice *Parsons*, in delivering his opinion, in the case cited, relied on the dictum of Lord *Mansfield*, in *Bree v. Holbeck*, and the case of *The South Sea Company v. Wymondsell*, (3 *P. Wms.* 143.) which was a bill for relief on the ground of fraud in a certain contract for stock; and Lord Chancellor *King* referred to Lord *Warrington's* case, (1 *Bro. P. C.* 455.) in which it was held, that if the fraud was known above six years before the filing of the bill, it would be barred by the statute; and that it was necessary to charge that the fraud was discovered within six years. The grounds of that decision, as stated by Lord *Redesdale*, (2 *Sch. & Lef* 634.) were, that 'the discovery of the fraud being alleged to be at a subsequent period, and arising out of circumstances collateral, a court of equity was warranted in avoiding the transaction, notwithstanding the statute; for, pending the concealment of the fraud, the statute of limitations ought not in conscience to run; the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time.' This doctrine of a court of equity is not applicable in courts of law, *which must be bound by the positive provisions of the statute. It is not surprising, that the judges in *Massachusetts* and *Pennsylvania*, not adverting to this distinction between the constitution and doctrines of the two courts, should talk so loosely on the subject. This court is now called upon to

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lay down a rule of law, which was not present to the minds of those who framed the statute; and if it is to prevail, why may it not be applicable to the case of a dormant partner, concealed by the active partner; or to criminal cases, where the crime is concealed by the party for more than three years? If the rule applies to one section of the statute, it must be equally applicable to the others. In *Fowler v. Hunt*, the court merely decide what shall be a *return* into the state, within the meaning of the *proviso* to the fifth section of the statute; that it must be open and public, not clandestine.

Even if the position of Lord *Mansfield* was sound, it does not apply to this case; for the plaintiff has abandoned his count for money had and received, which is alone analogous to a bill in equity, and proceeds solely on the ground of fraud. He does not allege that the defendants have not done the work; but merely that it has not been done well, or as it ought to have been done, according to the contract. The deception alleged in the replication is, the delivery of certain false and incorrect field-books, and maps of the survey; but this was before the plaintiff paid his money. If a false assertion or representation is a sufficient answer to a plea of the statute of limitations, it will be, in effect, repealed.

SPENCER, Ch. J., delivered the opinion of the court. The defendants have demurred generally to the plaintiff's replications to a plea of the statute of limitations. The declaration is in *assumpsit*, on the promises of the testator, as a surveyor, for a reward to be paid to him therefor, by the plaintiff, to survey out into lots, skilfully and accurately, a township of land, and to delineate the same on a map, to enable the plaintiff, the proprietor thereof, to sell the same in parcels, and to actual settlers. The breach alleged is, that although the testator was paid therefor a large sum of money, he negligently and fraudulently performed his undertaking, *and did not faithfully and accurately execute the work; but, on the contrary, did it so unskilfully and negligently, that the same was of no value to the plaintiff.

The defendants pleaded the statute of limitations; that the action did not accrue to the plaintiff, within six years before the exhibition of the plaintiff's bill. To this plea the plaintiff replied, setting forth the particulars of the testator's fraud in making the survey, and the unskilful, insufficient and unworkmanlike manner in which the work had been done; and that the land, at the time of the survey thereof, was in a state of nature, and was covered with timber, trees and underbrush; and that by reason thereof, and of the false and incorrect field-notes, maps and plats, the fraud and deceit practised by the testator were not discovered by the plaintiff, until a long time after the contract was performed, and after parts of the land had been contracted to be sold by the plaintiff to settlers; to wit, on the first day of *May*, 1818, at, &c. There are four several replications, substantially to the same effect, to these the defendants have put in a general demurrer.

Upon the argument, several exceptions were taken to the repli-

cations: 1st. That the action, as set forth in the replications, does not lie against executors. 2d. That the replications are a departure from the declaration. 3d. That they are double, inconsistent and uncertain; and, 4. That the excuse set forth, in avoidance of the plea, is insufficient. As the opinion of the court is founded on the last exception, it will not be necessary to examine, particularly, the other objections to the replication; but we have no difficulty in saying, that they are not well taken.

It is a general rule, that a replication must not depart from any material allegation in the declaration; yet, where there is an evasive plea, the plaintiff may avoid the effect of it by restating his cause of action with more particularity and certainty, and so as to meet and thwart the particular defence set up. (1 *Chitty's Pl.* 602, 603.) An action will not lie against the representatives of a party for a fraud, which does not benefit the assets; but it will lie upon a contract which has been fraudulently performed. As to the duplicity complained of, if any exists, the objection cannot be taken *on a general demurrer. The question, then, is, whether the frauds disclosed in the replications, in the survey made by the testator, and the non-discovery of those frauds, from the causes set forth, within six years from the performance of the survey, preclude the defendants from pleading the statute of limitations, in avoidance of the plaintiff's original cause of action? And this leads to the inquiry, whether the plaintiff can, in a court of law, set up a fraud on the part of the defendant, to take a case out of the operation of the statute of limitations; and, if he can, whether sufficient matter has been alleged to deprive the defendants of the protection of the statute? The statute (1 *N. R. L.* 186.) enacts, that all actions upon the case, and of account, other than actions for slander, and actions which concern the trade of merchandise between merchant and merchant, their factors and servants; and all actions of debt for arrearages of rent, or founded on any contract without specialty, and all actions of trespass, detinue and replevin, for goods or chattels, and actions of trespass *quare clausum fregit*, shall be commenced and sued within six years next after the cause of such actions accrued, and not after. There are then savings, in case of the arrest or reversal of judgments, in favor of infants, feme coverts, insane or imprisoned persons, and where a person against whom a cause of action shall accrue, and who shall be out of the state at the time the same accrues; giving the person entitled to the action a right to bring the same within the times limited, after the return of the person so absent into this state.

It was urged, on the argument, that the plaintiff's cause of action might be considered as accruing, when he discovered the fraud in making the survey by the testator; or that the court might say, that this case, and others similarly circumstanced, were not within the spirit and intent of the statute. It will readily occur to the profession, that courts of law have, in many instances, introduced great refinements in the construction of statutes; and that, in some instances, judges of great celebrity have deplored the first aberration from the plain and natural meaning of the words of statutes. With respect to the statute now under con-

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sideration, there has been great latitude of construction, going *almost to its abrogation. I mean, as to what amounted to an acknowledgment of a debt, so as to take it out of the operation of the statute; and, of late, courts of law are travelling back to the support of the plain and obvious meaning of the enactment. After premising thus much, the inquiry is, When did the plaintiff's cause of action accrue? Most certainly, when the fraud was consummated; and that was when the testator had completed the survey, as far as it was completed, and made returns of his field-notes, maps and plats, and received his compensation. The injury, as far as he was concerned, was then done; and he became, immediately, liable to an action, for the fraudulent and imperfect manner of executing the duties he had assumed. The fact, that the plaintiff did not discover the imposition practised upon him, is entirely distinct from the existence of such fraud and imposition. If, then, the plaintiff's cause of action accrued upon the consummation of the fraud by the testator, and not at the time the plaintiff discovered it, the statute interposes as a protection, unless the action has been commenced and sued within six years next after the cause of action accrued. But it is asserted, that fraud committed under such circumstances as to conceal the knowledge of a fact, and thus preventing a plaintiff from asserting his rights within the limited period, may be replied, and is an answer to a plea of the statute of limitations, if the action or suit be brought within six years after the discovery of the fraud. The only case in support of this position, in a court of common law, in the *English* courts, is that of *Bree v. Holbeck*, (*Doug.* 654.) In that case, the replication, after setting forth the means by which the plaintiff had been defrauded, went on to state, that the plaintiff, at the time of the execution of the assignment, and of paying the money, was ignorant of the falsehood of the assertions, and of the fraud so practised upon him; and did not discover them till within the space of six years next before suing out the writ. To this replication there was a demurrer. Lord *Mansfield* was of opinion, that the replication had charged no fraud on the defendant. He said, "There may be cases, too, which fraud will take out of the statute of limitations." The plaintiff's attorney had leave to amend, in case, upon inquiry, the facts would support a *charge of fraud; and there is no further trace of the case. In the case of *The First Massachusetts Turnpike Company v. Field and others*, (*3 Mass. Rep.* 201.) the question arose on a replication, which showed the impracticability, if not impossibility, of discovering the fraud. The replication stated, that the defendants fraudu'ently and deceitfully concealed the bad foundation, the unsuitable materials, and the work unfaithfully executed, by covering the same with earth, and smoothing the surface, so that it appeared to the plaintiffs that the contract had been faithfully executed. *Parsons*, Ch. J., held, that the replication must disclose a fraudulent transaction in the defendants, by which the time when the cause of action accrued must have been fraudulently concealed from the knowledge of the plaintiff, until a period within six years before the action was commenced; and that where the

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delay of bringing the suit is owing to the fraud of the defendant, the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain the knowledge that he had a cause of action; and that if this knowledge is fraudulently concealed from him by the defendant, the court would violate a sacred rule of law, if they permitted the defendant to avail himself of his own fraud. The only cases referred to by Chief Justice *Parsons* are *Bree v. Holbeck*, and *The South Sea Company v. Wymondsell*, (3 P. Wms. 143.) which refers to the case of Lord *Warrington*, where he had a decree, notwithstanding the statute of limitations was pleaded; the bill having been amended by charging the discovery of the fraud to be within six years before exhibiting his bill. The same principle has been adopted in the courts of some of the other states.

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We cannot, however, yield the convictions of our own minds to decisions evidently borrowed from the courts of equity, and which never have been sanctioned in the courts of law in that country from which our jurisprudence is derived. It has been already observed, that the *dictum* of Lord *Mansfield*, in *Bree v. Holbeck*, is the only instance in which such a position was ever advanced in *Westminster Hall*; and when it is further considered, that his lordship had an inclination to intrench on courts of equity, that mere *dictum* cannot be regarded as authority.

*There is a marked and manifest distinction between a plea of the statute of limitations in a court of law, and in a court of equity. The best and fullest view of the effect of such a plea, in a court of equity, is given by Lord *Redesdale*, in 2 Sch. & Lef. p. 634. He says, that although the statute does not, in terms, apply to suits in equity, it has been adopted there, as a rule prescribed by the legislature; and the reason he gives, why, if the fraud has been concealed by the one party, until it has been discovered by the other, within six years before the commencement of his suit, it shall not operate as a bar, is this: *that the statute ought not to run: the conscience of the party being so affected, that he ought not to be allowed to avail himself of the length of time.* This is very intelligible and sound doctrine, in a court of equity; and is, I apprehend, the true and only tenable ground to deprive a defendant of the benefit of the plea. Courts of equity, not being bound by the statute, any further than they have seen fit to adopt its provisions as a reasonable rule, and then only in analogy to the general doctrines of that court, are perfectly right in saying, that a party cannot, in good conscience, avail himself of the statute, when, by his own fraud, he has prevented the other party from coming to a knowledge of his rights, until within six years prior to the commencement of the suit. But courts of law are expressly bound by the statute; it relates to specified actions; and it declares that such actions shall be commenced and sued within six years next after the cause of such actions accrued, and not after: thus, not only affirmatively declaring within what time these actions are to be brought, but inhibiting their being brought after that period. I know of no dispensing power which courts of law possess, arising from any cause whatever; and it seems to me, that where

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the legislature, in the same statute, gives an extension of time, in cases of the arrest or reversal of judgment. in cases of infancy, coverture of the feme, insanity, and imprisonment, and for an absence of the defendant out of the state, when the cause of action accrued, that it would be an assumption of legislative authority to introduce any other proviso. The plaintiff's case may be a very hard *one; but that affords no reason for construing away a statute of great public benefit, and which, in many cases, is a shield against antiquated and stale demands. The plaintiff's counsel sought to derive aid to their argument from the case of *Fowler v. Hunt*, (10 Johns. Rep. 461.) in which the question was on the last proviso of the statute, and whether the defendant had, at a certain period, returned into this state. We held, that the *return into this state* must not be clandestine, with an intent to defraud the creditor, by setting the statute in operation, and then departing; that it must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence, and due means, of arresting the debtor. The argument of counsel was, that if the court could, in the one case, examine into the spirit and intent of the statute, they were at liberty to do so in the other case. Having once ascertained when the plaintiff's cause of action accrued, there was nothing left for construction; for then the statute interposes, and requires the suit to be brought within the period limited, except under the modifications contained in the proviso.

But were we to proceed on the suggestion of Lord *Mansfield*, the plaintiff would then have failed to make out a case entitling him to an exemption from suing, because he did not discover the fraud of the testator until the first day of *May*, 1818. The concealment of the fraud is not imputed to the testator. What he did was visible, and what he neglected to do would, or might have been discovered by repairing to the land. There was no concealment of the work actually done, as in the case in 3 *Mass. Rep.* 201.; and it was neither impossible nor impracticable to find out the fraud. That the lands were in a state of nature, and thickly covered with forest trees and underwood, certainly would not have prevented the detection, had means been adopted for that purpose. But we wish to be understood, as deciding the case on the ground, that whether there was a fraudulent concealment or not, so as to prevent the plaintiff's discovering the fraud, until within six years before the commencement of this suit, sitting as a court of law, and bound by the express provisions of the *statute, we could not notice the fraud so as to take the case out of the operation of the statute.

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Judgment for the defendants, with leave to the plaintiff to amend.

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v.
STERNBERG

EJECTMENT for land, in the town of *Danube*, in the county of *Herkimer*, tried at the *Herkimer* circuit, in *June*, 1821, before Mr. Justice PLATT.

The plaintiff claimed title to the premises in question, by virtue of a sheriff's sale, under a judgment and execution in favor of *Le Ray*, against *Peter Sternberg*, docketed *February* 16, 1811; and he gave in evidence the record of the judgment, and the execution and return thereof; and a deed from the sheriff to the lessor, dated *June* 26, 1819, in due form.

The defendant claimed title to the same premises by virtue of a deed from the sheriff on a sale under an execution in favor of *Le Ray*, against *Peter Sternberg*, on a judgment docketed *May* 16, 1810. He gave in evidence a record of the judgment, and the execution and return thereon; and a deed from the sheriff to him, in due form, dated *October* 13, 1817, acknowledged and recorded, and which recited the sale upon such judgment and execution.

The plaintiff then gave in evidence a record of a judgment in the Supreme Court in favor of *Marcus Sternberg*, against *Peter Sternberg*, docketed on the ninth of *May*, 1816, and a copy of the execution thereon. *P. Souls*, who was the under-sheriff of *Herkimer* county in 1816 and 1817, testified, that he had in his hands the last-mentioned execution, at the suit of *Marcus Sternberg* against *Peter Sternberg*, received by him *May* 14, 1816. That in the summer of 1817, he sold the personal property of *Peter Sternberg*; and then, by direction of *John Eisenlord*, the sheriff, advertised his real estate, under several executions. That the sheriff, who had the execution at the suit of *Le Ray*, said that he should attend on the day of sale. At the day of sale, the witness waited more than an hour and a half, for the sheriff, and he not coming, the witness opened the sale, and he thought he read the advertisements publicly; he told, in the presence of *M. Sternberg*, *P. Sternberg*, *N. Sternberg*, and others there attending, that he expected the sheriff there with the execution of *Le Ray*, but as he did not come, he should proceed to sell under the execution in his hands, in favor of *M. Sternberg* against *P. Sternberg*, and leave it to the sheriff to give a deed on which execution he saw fit. That *George Dominick* particularly asked him on what execution the witness intended to sell, and on being answered, replied, that he had come to bid for the property, if it were sold on *Le Ray's* execution; but if it was not to be sold on that execution, he did not wish to buy. The witness publicly stated, that he had no authority to sell on any other execution than the one in his hands, in favor of *M. Sternberg*, against *P. Sternberg*. That he accordingly set up the property for sale on that execution, and on no other; and the premises were struck off to *M. Sternberg*, the brother of the defendant. That *M. Sternberg* wanted the witness

A sheriff's deed is, per se evidence of title in the fee; and evidence is admissible to contradict the recital, or to show that the land was sold under a different judgment and than cited deed. Such may be proved from a sale: seem sale may side of the or a credit ground (a)

(a) Vid. *Gorham v. Gale*, 7 Conn. Rep. 739. *Jackson v. Roberts*, 7 Wendell's Rep. 83. *Dickenson v. Gilliland*, 1 Cow. Rep. 481.

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to give him a deed under *Le Ray's* execution, which the witness declined, and referred him to the sheriff. That they, afterwards, met the sheriff, and the witness explained to him the circumstances of the sale; and the sheriff said he could not give *M. Sternberg* a deed under *Le Ray's* execution, unless *M. Sternberg* paid the money bid for the property to the sheriff, so that he could apply it on that execution. *M. Sternberg* then agreed to pay the sheriff the money, and accordingly paid him part of it, and took a receipt for the amount, on which the sheriff agreed to give him a deed on *Le Ray's* execution, on his paying the residue of the money. The sheriff directed the return to be made on the execution in favor of *M. Sternberg*, of 108 dollars and 11 cents, made on a sale of the personal property, dated *September 18, 1817*, which the witness signed; and the reason why the sale of the real estate was not mentioned in the return was, that the sheriff said that he applied the money arising from the sale of the real estate to *Le Ray's* execution, *and should make a return of it on that execution. Several other persons, present at the sale, were called as witnesses, who confirmed, substantially, the statement made by the under sheriff. *Eisenlord*, the then sheriff, was also sworn as a witness.

The parol evidence was admitted, subject to the opinion of the court as to its admissibility and effect; and a verdict was taken for the plaintiff, subject to the opinion of the court on a case containing the facts above stated. The case was submitted to the court without argument.

Per Curiam. The parol evidence falls short of proving such fraud, on the part of the defendant, as would vitiate and annul the sheriff's deed to him, at law; and the evidence was inadmissible in any other view, for it contradicted the recital in the deed as to the particular execution on which the sale was made. (*Jackson v. Vanderheyden*, 17 Johns. Rep. 167.) The deed to the defendant is, *per se*, evidence of title in him. Judgment must, accordingly, be given for the defendant. But on a timely application by the creditor, *Le Ray*, or by the debtor, *Peter Sternberg*, or by any judgment creditor who is injured by the proceedings, we should, probably, set aside the sale and the sheriff's deed, if the facts stated in the case should remain uncontradicted and unexplained.

Judgment for the defendant

JONES against CLARK and STEWART.

A tenant of
a mortgagor in

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possession, after the mortgage has become forfeited, during the continuance of the

IN ERROR, to the Court of Common Pleas, or Mayor's Court of Albany.

The defendants in error brought an action of *assumpsit* *against the plaintiff in error, in the court below, to recover one quarter's rent of a house and lot, formerly owned by *Gilbert Stewart*, due *August 1, 1821*. The defendant pleaded the general issue. At the trial, the plaintiffs gave in evidence a written lease of the

premises, from them to the defendant and *Maltby Howel*, for one year, ending *May 1, 1821*, for the rent of 400 dollars, payable quarterly.

M. Howel, a witness for the plaintiff, testified, that the defendant took possession of the premises, under the said lease, at its commencement, on the first of *May, 1820*, and has since continued in occupation thereof. The witness, in answer to a question, which was objected to by the defendant's counsel, but allowed by the court, and the point reserved, said, that he joined in the execution of the lease merely as surety for the payment of the rent by the defendant, *Jones*, and had never occupied the premises. It was proved that, at the expiration of the term, *Jones*, without the intervention or concurrence of *Howel*, agreed with *Clark*, one of the plaintiffs below, to take the premises for another year, at the same rent.

The defendant below gave in evidence a bond of *Gilbert Stewart*, to *R. Pratt* and *W. Durant*, for 6000 dollars, payable on the 4th of *February, 1821*, and a mortgage to them of the premises, dated *February 4, 1819*, duly recorded; and also a lease from *Pratt* and *Durant*, to the defendant, of the premises in question, dated *February 7, 1821*, for one year, commencing *May 1, 1821*, at the yearly rent of 400 dollars; which lease contained a clause, by which the lessors engaged to indemnify the defendant against all claims for rent, by any other persons; and also a general assignment by *Gilbert Stewart*, of all his property, including the premises in question, to the plaintiffs below, dated *August, 1819*, in trust, for the benefit of his creditors, as specified in the assignment.

A verdict was taken by consent, for the plaintiffs below, for one quarter's rent, subject to the opinion of the court, &c., on which a judgment was, afterwards, rendered by the court below..

H. Bleecker, for the plaintiff in error. 1. There was *not sufficient evidence, in the court below, that the defendant held under the plaintiffs.

2. The testimony of *Howel* was inadmissible.

3. The important question is as to the effect of the mortgage. The lease was made subsequent to the mortgage; and according to the decision of the court, in *M Kircher v. Hawley*, (16 Johns. Rep. 289.) there was no privity between the defendant and the mortgagees, so that they could distrain for rent; but it will be said, that the lease by the assignees of S., the mortgagor, was void as to the mortgagees; (*Birch v. Wright*, 1 Term Rep. 380.) that they, having the legal estate in them, and, therefore, a right to the possession, could eject the tenant. Now, why should not the tenant of a mortgagor, liable to be put out of possession at any time, be at liberty to receive a lease from the mortgagee, having a right to the possession? If he submits to be ejected, he loses the enjoyment of the premises, and the mortgagor gains nothing, for he cannot compel the tenant to pay rent after he has been ejected. The mortgagees are entitled to the rents and profits of

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lease from the mortgagor, may attorn to, and take a lease from the mortgagee; and in an action brought against him by the mortgagor, for rent under his lease, he may set up such attornment as a legal defence.

(a) One of two lessees, after the lease has expired, is a competent witness to show that he had no beneficial interest in the lease, but joined in the execution of it, merely as a surety for the payment of the rent by the co lessee.

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(a) Vide *Brown v Dean*, 3 Wendell's Rep. 208. *Dickenson v. Clark*, 6 Conn. Rep. 147.

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the mortgaged premises, and may apply the same towards the payment of the debt. This is for the benefit of both parties. The right claimed by the mortgagees is founded in justice and convenience.

Then, as to the law of *attornment*, which has a strong bearing on the question. The law is fully stated by Mr. *Butler*, in his note to *Co. Litt.* 309. a. *Attornment* was for the benefit of the tenant. He was not to be transferred to a new lord without his consent. The necessity of attornment was, in some measure, avoided by the statute of *uses*, and the statute of *wills*; and its necessity and efficacy were almost wholly taken away by the stat. of 4 & 5 *Anne*, c. 16. and 11 *Geo.* II. c. 19. The former (see 1 *N. R. L.* 525. sess. 36. ch. 56. s. 25.) makes all grants and conveyances valid, without the attornment of the tenants; and the latter, (see 1 *N. R. L.* 443. sess. 36. ch. 63. s. 27, 28.) after reciting that landlords are turned out of the possession of their estates by the attornments of tenants to strangers, who claim titles to the estates, &c., declares, that all such attornments shall be absolutely null and void, and that they shall not affect the possession of the landlords; and it *provides*, *among other things, that the act shall not extend to affect any attornment made to any mortgagee, after the mortgage has become forfeited. After forfeiture, the mortgagee is not only entitled to possession, but has an absolute estate at law. The statute supposes that the possession could be changed by attornment to a stranger claiming title; and to prevent such a change, it makes the attornment void, except in the cases mentioned in the *proviso*, in which it permits the possession to be changed, and, consequently, makes the attornment of the tenant, in such case, equivalent to a recovery of the possession by suit at law. This statute, then, provides for the very case in question. It must embrace, also, the case of a lease made *subsequent* to the mortgage. It does not embrace the case of a tenant *prior* to the mortgage; because it was unnecessary to provide for such case, as, by the statute of 4 & 5 *Anne*, such prior tenant became the tenant of a subsequent mortgagee.

It cannot be supposed that the *British* parliament, or our legislature, when these statutes were passed, concerning attornments to *strangers*, were entirely wrong in supposing that such attornments changed the possession. For, if such an attornment did not effect a change of possession, the acts passed on the subject were nugatory. "The tenant has no right to the reversion, and, therefore, cannot alter the disposition of it one way or the other; but he has a right to the possession, and, therefore, can put whom he pleases into the possession of what he has in him." (*Gilb. Tenures*, 82. 3 *Vin. Abr.* tit. *Attornment*, p. 317.) So that it appears, that the tenant could change the possession in the manner contemplated by the statute.

Whatever doubts may be entertained concerning the proviso in the statute of *Anne*, they cannot make the *proviso* in the statute of *George* II. nugatory; and if the enacting clause of the latter statute is not itself perfectly nugatory, the proviso is very important. It is not correct, then, to say, that these statutes have made

attornments both unnecessary and inoperative, since the statute of *George II.* allows them to operate in the cases mentioned in the *proviso*. (Per *Buller, J.* 1 *Term Rep.* 384.) Nothing is better settled, than that all leases, or other interest in the land, made or *conveyed by the mortgagor subsequent to the mortgage, though before forfeiture, are void as against the mortgagee (1 *Powell on Mort.* 226. 1 *Term Rep.* 383.) As to him, the tenants under such leases, or persons claiming such interests, may be considered as trespassers. Now, if such tenant is a trespasser as to the mortgagee, it must follow, that the tenant can agree to become the tenant of the mortgagee; and then a *privity* exists between them, and the tenant becomes liable to a suit or a distress by the mortgagee for the rent. The statute of *George II.*, by allowing an attornment in such case to be valid, made it, of course, valid and lawful as against the mortgagor, and those claiming under him; and it was unnecessary to allow such attornment to be good against any other person. It will, perhaps, be said, that a court of equity will not permit the mortgagee to make leases to the prejudice of the mortgagor's right to redeem. (1 *Powell on Mort.* 247.) But that is a rule peculiar to that court, with which we have no concern here. It was intended to protect the right of redemption, which can be exercised in that court only.

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Loucks, contra. The question in this case is, whether a tenant of a mortgagor in possession, who became such subsequent to the giving of the mortgage, can, in a suit by his landlord for rent, set up, as a legal defence, that, after the mortgage became forfeited, he agreed with the mortgagee to pay rent to him, notwithstanding his lease from the mortgagor had not expired. This question turns, in a great measure, on the true meaning and import of the term *attornment*. It is defined to be the tenant's consent to his landlord's granting the estate to another person, whose tenant he agrees to be thenceforth, *by force of the grant*; (*Litt. b. 3. c. 10. sec. 551. Co. Litt. 309. a. 2 Bl. Com. 292.*) and without such consent actually given during the life of the grantor, the grant, at common law, is void and inoperative. This rule, though, in some instances, done away by the statute of *uses*, (1 *Term Rep.* 384.) continued until the statute of *Anne*. (1 *N. R. L.* 525.) By force of this statute, a grantor of lands on which he has a tenant, by making the grant, transfers the tenant to the grantee; *and thus, by operation of law, a *privity* is instantly created between the tenant and the grantee, (1 *Term Rep.* 384.) whose tenant he thus becomes, instead of his former landlord; and he cannot be turned out of possession until his lease has expired. It was, therefore, rightly decided, in *Moss v. Gallimore*, (*Doug.* 279. 283.) that the grantee might, in such case, distrain for rent, having the legal title to it.

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But the case of a tenant who takes his lease from the mortgagor in possession, *subsequent* to the mortgage, is very different. In such case, the grant is made *before* he becomes a tenant, and, of course, his consent or attornment could not be necessary to give validity to the grant. It follows, that the statute of *Anne* has no

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operation in such a case, since it merely *supplies* attornment where it was required, at common law, to give effect to a grant made *pending a tenancy*.

It is clear, that a tenant of a mortgagor, becoming such *subsequent* to a mortgage, is not *transferred* to the mortgagee by the act of making the mortgage, and the statute of *Anne*. He is, therefore, a mere stranger to the mortgagee, and a trespasser; (*Woodfall's Ten. & Land.* 110.) and may be ejected after the mortgage is forfeited, without notice to quit. (*Doug.* 21. 4 *Johns. Rep.* 215.) And since there is no *privity* between the mortgagee and such tenant, he cannot be distrained upon, or sued, for rent, by the mortgagee. (*M'Kircher v. Hawley*, 16 *Johns. Rep.* 289.) But it is said, that *Jones*, in this case, has *attorned*, by taking a lease from the mortgagees, and thereby created a *privity*. This is begging the question; for, as has already been shown, *attornment* has no application to a person in his situation. That such a tenant cannot attorn, or, by any act of his, create a *privity*, to the prejudice of his landlord, is decided in *M'Kircher v. Hawley*; for as attornments might be made by parol, or implied from circumstances, or the acts of the tenant, the setting up in his plea a *distress* of his goods by the mortgagee, must have been considered as an attornment to the mortgagee, or on no other principle could he claim to be exempt from paying rent to his lessor; yet the court overruled the plea, on demurrer, for want of a *privity* between the tenant and mortgagee. The *proviso* in *the statute of *George II.* (1 *N. R. L.* 443.) exempting certain attornments from the operation of the statute, did not create any new species of attornment, or introduce them where they could not have been before lawfully made. It merely saves such as already existed. The *proviso* was added, *ex abundanti cautela*; and was, in truth, wholly unnecessary. It is entirely nugatory, as it saves nothing which would not have existed without it. It is not unusual to put such *provisos* in statutes. There is one of similar character in the statute of *Anne*, (1 *N. R. L.* 525.) which, as Mr. Justice *Buller* observes, (1 *Term Rep.* 385.) saves no other or greater rights than would have existed without it. And since the statute of *Anne* has rendered attornments unnecessary in all cases in which they were required at common law, or could be lawfully made, (*Doug.* 279. 1 *Term Rep.* 388.) and which statute extends to mortgages, (1 *Term Rep.* 384.) it is very correctly said by *Butler*, in his note to *Co. Litt.* 309. *a.*, that these statutes have made attornments both unnecessary and inoperative; unnecessary, if not made where the common law required them; and inoperative, if made where they were not required. (a)

A mortgagor in possession does not stand in the relation of a *tenant* to the mortgagee; (1 *Term Rep.* 382. *Doug.* 279.) and his lessee must be in the same situation. Hence it is, that a lease by the mortgagor is void as against the mortgagee; or, in other words, he can make no lease to bind the mortgagee. The mortgagee may, however, affirm the lease; but that does not make him *landlord*; but merely sanctions the relation between the

(a) See, also, *Gilb. Law of Tenures*, 4th ed. p. 81, notes by the editors.

mortgagor and his tenant, so that he cannot, in such case, eject the tenant, until the lease has expired. And in this sense are the expressions met with in the books to be understood, that a mortgagee may treat such lessee as a trespasser. (*Bac. Ab. tit. Mortg. C. 16 Johns. Rep. 291.*) An election by the mortgagee not to consider the tenant a trespasser, does not make him *his* tenant. If the tenant agrees with the mortgagee to be his tenant, that is, taking a *new* lease, it is not a transfer or continuation of the old one, as it would be in the case of a lease *anterior* to the mortgage. It is *settled, that, *before foreclosure*, the mortgagee cannot lease the premises so as to bind the mortgagor. (1 *Powell on Mortg. 247, 248. Woodfall, 111. 9 Mod. 1.*) The case in which this was first established, it is true, came from the Court of Chancery; but the relative rights and obligations between mortgagor and mortgagee, are now the same at law as in equity; and reason requires that it should be so. (1 *Caines's Cas. in Error, 69. Hitchcock v. Harrington, 6 Johns. Rep. 290.*) The rule is reciprocal; as the mortgagor cannot lease so as to bind the mortgagee, so the latter cannot lease, to bind the former. Besides, before foreclosure, the mortgagee has no *legal* interest, as regards third persons, in the mortgaged premises. (*Jackson v. Willard, 4 Johns. Rep. 41.*) How, then, can he grant any interest to a tenant?

Again; if the mortgagee could thus get into possession, without being put to his suit, the mortgagor might be deprived of his defence as to the validity of the mortgage. (*Jackson, ex. dem. Sternbergh, v. Dominick, 14 Johns. Rep. 435.*) The editor of *Bacon's Abr.* (tit. *Mortgage, C. Gwillim's ed. by Wilson,*) says, "If a mortgagee permits the lessee (who became such subsequent to the mortgage) to enjoy his lease, the mortgagor may thenceforth be considered as a *receiver* of the rent, or, in some sort, a trustee, for the mortgagee, who may, at any time, countermand the implied authority, by giving notice to the tenant not to pay rent to the mortgagor any longer." For this he cites 6 *Atk. 601*; but this note does not evince the usual accuracy and discrimination of the learned editor. The authority cited contains no such doctrine. The mortgagor is not a receiver of the rent for the mortgagee, for, if he were, he would be bound to pay over the whole. (1 *Term Rep. 383.*) He receives the rent to his own use, and is only bound to pay the mortgage money: and in regard to *notice* to the tenant, not to pay any more rent to the mortgagor, this has reference only to the case of a tenant *anterior* to the mortgage, (*Ketch v. Hall, Doug. 21.*) for he is transferred, by the giving of the mortgage, and by the consent of all parties. The mortgagee can, in effect, countermand the receipt of the rent by the mortgagor, only by ejecting the tenant, or by a bill in *equity, (*Doug. 21. 4 John's Rep. 216.*) not by considering himself in the light of a *landlord*.

The defendant below, (*Jones*), then, being under no obligation, by reason of any act of the plaintiffs below, to pay rent to the mortgagees, his obligation to pay it to the plaintiffs below continues until he is ejected under the mortgage. (*Cowp. 242.*) He cannot exonerate himself from this obligation, without the consent of his landlord; and the rule that a tenant, in an action against him

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for rent, cannot dispute the title of his landlord, applies in full force. (13 *Johns. Rep.* 240. 297. 489. *Peake's Ex.* 242. 244.) On the other hand, in the case of a tenant of the mortgagor, who became such *prior* to the mortgage, he may pay the rent to the mortgagee, on mere notice from him, without a breach of his obligation to his former landlord, who, by the act of making the mortgage, transfers the tenancy, and the legal rights incident to it, to the mortgagee; and this is the "attornment to a mortgagee," which is saved by the *proviso* in the statute of *Geo. II.* The taking a lease by *Jones* from the mortgagees was, therefore, an act of disloyalty, in derogation of the rights of the plaintiffs below, and fraudulent, as against them.

Bleecker, in reply. It is said, that the mortgagee, before a foreclosure, has no legal interest in the premises; but the case cited, (6 *Johns. Rep.* 290.) shows that the mortgagor has the legal interest, as to all others, *except the mortgagee and his representatives.* It is idle to say, that the mortgagee has not the legal interest, when it is admitted that he may, at any time, obtain possession by an action of ejectment.

Again; it is said, that the mortgagee can, in effect, countermand the payment of further rent to the mortgagor by ejecting the tenant. Now, the agreement of the tenant to become the tenant of the mortgagee, accomplishes all that could be done by an ejectment, against which the tenant cannot defend himself. He does not prejudice the rights of others, by preferring to become a tenant to the mortgagee, rather than be turned out of possession, by an action of ejectment. As against the mortgagee, the mortgagor has no right to the premises, or to the rent. This is not the ordinary case of a *tenant disputing his landlord's title. The title of the mortgagee is not hostile to that of the mortgagor. It is the same title. The landlord has created an encumbrance on the premises, and has thereby subjected the tenant to an ejectment, which the statute of *Geo. II.* (1 *N. R. L.* 443.) allows the tenant to avoid, by becoming the tenant of the mortgagee. This results from the act of the mortgagor, not from the mere volition of the tenant. The statute allows the tenant to change his situation, not in hostility to the rights of the mortgagor, but in accordance with them, and to attain the objects and purposes of the encumbrance. The tenant does not deny the title of the mortgagor; if he had no title, the mortgage itself would be invalid, and give no title to the mortgagees. "The mortgagor and mortgagee have but one title between them." (Per *Buller, J.* 1 *Term Rep.* 383.) "The defendant may show that the plaintiff had only a temporary interest at the time of the demise, which has since expired; or that he has mortgaged the estate to another person, who has given the defendant notice to pay the rent to him." (*Peake's Ex.* 245.) Here the mortgagor had a right of possession, determinable by the will of the mortgagee. It was, in this sense, a temporary interest. If, instead of taking a lease from the mortgagees, the tenant had submitted to an action of ejectment, and after judgment, and before execution of the writ of possession, he had agreed to receive a

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lease from the mortgagees, would not this have afforded him a defence against a suit by the mortgagor for rent? And where, in reason and good sense, is the difference between the case supposed and the one now before the court?

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SPENCER, Ch. J., delivered the opinion of the court. The points made by the counsel for the plaintiff in error, are, 1. That there was no sufficient evidence that *Jones* held under *Clark* and *Stewart*.

2. That *Howel* was an incompetent witness.

3. That the matters shown by the defendant below, were a complete defence.

The first and second points may, at once, be disposed of. There was complete evidence of the hiring of the premises, *by *Jones*, for the second year. *Howel* was a competent witness to show that he had no beneficial interest in the expired lease, though the fact itself was no wise material. The cause depends on the third point; and it presents this question, whether a tenant of the mortgagor in possession, and who became such subsequent to the giving the mortgage, can, in a suit by his landlord, the mortgagor, set up as a legal defence, that after the mortgage became forfeited, he attorned to the mortgagee, and took a lease from him, during the continuance of the lease from the mortgagor. This case has probably been decided in the court below, on the authority of the case of *M'Kircher v. Hawley*, (16 *Johns. Rep.* 289.) The principle decided in that case was this: that a mortgagee could not distrain for rent becoming due under a lease made by the mortgagor subsequent to giving the mortgage, because there was no privity of estate or contract between the mortgagee and such a tenant; and we held, that, to enable a party to distrain for rent, he must have a concurrent right to maintain an action for the rent; and if there was no privity of contract or estate, an action could not be maintained.

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When the plaintiff in error attorned to the mortgagees, and took a lease from them, their title to enter under their mortgage was complete; for, the day of payment having passed, the condition was broken, and the estate of the mortgagees was absolute at law. This case, then, presents a very different question from the one decided in *M'Kircher v. Hawley*. There, the point was, whether the mortgagee could distrain, or, in effect, sue for the rent. Here, it is, whether the tenant of the mortgagor could not, by his own act and consent, become the future tenant of the mortgagees, without any disloyalty to the mortgagor. "At common law," says Mr. *Butler*, (in note 272 to *Co. Litt.* 309. a.) "attornment signified only the consent of the tenant to the grant of the seignior; or, in other words, his consent to become the tenant of the new lord." He goes on to show the operation of the statute of *quia emptores*, and the statute of *uses*, and the statute of *wills*; and observes, that the necessity and efficacy of attornments have been almost totally taken away by the statutes of 4 and 5 *Anne*, c. 16. *and 11 *George II.* c. 19. These two statutes have been reënacted here. The former does not relate to this case, but the

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latter has an important and decisive bearing upon it. The 28th section of the statute concerning *distresses, rents, and the renewal of leases*, (1 N. R. L. 443.) after reciting that the possession of estates is rendered precarious by the frequent and fraudulent practice of tenants attorning to strangers, by which means landlords and lessors are turned out of possession, and put to the difficulty and expense of recovering possession by suits at law, enacts, that *every such attornment* shall be null and void, and the possession of the landlords or lessors shall not be deemed to be, in any wise, changed by any such attornment; with a *proviso*, that nothing therein contained should extend to vacate or affect any attornment made pursuant to and in consequence of any judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or lessor, *or to any mortgagee after the mortgage is become forfeited*.

The mischief which the statute was intended to remedy, was the attornment by tenants to strangers claiming title; and without the *proviso*, the construction of the enacting part of the statute would have admitted of no doubt. But to remove every doubt, the legislature have declared who were not strangers, and to whom the tenant might lawfully attorn; *he may attorn to a mortgagee after the mortgage is forfeited*. The reason of this is obvious. The mortgagee, as between him and the mortgagor, has the right of entry, and is entitled to the possession of the premises. If, then, the tenant will do voluntarily what the law will coerce him to do, yield up the possession to the mortgagee, it is not an act injurious to the just rights of the mortgagor, nor disloyal towards him. Indeed, the rights of the tenant also require that he should be allowed to do so; for if he refuses to attorn, he at once subjects himself to eviction, and the payment of costs. The statute makes no difference between a tenant to the mortgagor, who becomes so before or after the execution of the mortgage. It applies to every tenant of the mortgagor, without reference to the time when he became tenant. The reason is the same in both cases, and *they are both embraced by the *proviso* of the statutes; and neither of them are within the mischiefs intended by the enacting part of the statute.

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Judgment reversed, and a *venire de novo* to be awarded in the court below.

THE PEOPLE *against* SMITH.

ON *certiorari* to the General Sessions of *Erie*.

If a justice delivers to a party a summons, signed by him, in blank, to be filled up with the names of the

parties, cause of action, &c., in his presence, and under his control, it is not a violation of the fourth section of the statute, (sess. 43. ch. 159.) passed April 7, 1820. (a) *Aliter*, if the party receiving a blank summons, fills it up out of the presence of the justice, though before it is delivered to a constable to be served.

(a) 2 Rev. Stat. 227.

act, passed *April 7, 1820*, (sess. 43. ch. 159.) (a) which enacts, "that it shall not be lawful for any justice of the peace to issue or deliver to any constable, or to any other person, any blank summons, warrant, or other process, signed by such justice, in which the names of the plaintiff and defendant, and the cause of action, or either of them, shall be omitted," &c. The defendant was tried and convicted; but judgment on the verdict was respited, and the proceedings removed by *certiorari*, for the opinion of this court.

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From the written report of the evidence, made by the judges of the Court of Sessions, it appeared, "that one *Torry* requested of the justice a summons, in favor of *T.*, against one *W. Keane*; that *T.*, the plaintiff, was in haste, and the justice, being then engaged in business, desired *T.* to call and get the summons at some other time, or on the next day. But *T.* informed the justice, that it was necessary to have the summons at that time; and that he would put in his name as plaintiff and *William Keane* as defendant; and afterwards, and before the delivery of it to the constable, he so filled it up accordingly." The summons was served, and returned to the justice; his signature being subscribed to it. The proof of these facts, by *parol* evidence, was objected to by the attorney for the prosecution, on the *ground that no notice had been given to produce the summons; but the objection was overruled by the court below.

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PLATT, J., delivered the opinion of the court. The objection to the *parol* evidence of the summons was properly overruled. The summons was in the possession of the defendant, and the indictment was ample notice to produce it. (*The People v. Holbrook*, 13 *Johns. Rep.* 90.) But the evidence, as detailed to us, does not contradict the supposition that *Torry* filled up the summons in the presence of the justice; and if so, there was no violation of the statute. The only question in the case turns on the fact, whether the justice delivered the summons, signed by him, in blank, and to be filled up by *Torry*, out of the presence, and beyond the control of the justice; or whether *T.* filled it up as the mere clerk of the justice. The former would be a violation of the statute; but the latter not so. Upon the evidence reported to us, we think there ought to be a new trial; and that the proceedings should be remanded to the Court of Sessions for that purpose.

(a) 2 *Rev. Stat.* 227.

HEMPSTEAD against N. and H. WEED.

IN ERROR, to the Mayor's Court of the city of *Albany*.

The defendants brought an action of debt against the plaintiff in error, in the court below, for the escape of *William Brown*, while in his custody, as sheriff, on a *ca. sa.* The declaration was in the usual form. The defendant pleaded *nil debet*, with leave of

Where a new sheriff is appointed, the prisoners remain in custody of the old sheriff, until they are delivered to his successor. (a)
If, therefore,

(a) *Vid. Jackson v. Collins*, 3 *Cow. Rep.* 89.

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the old sheriff omits to assign over to the new sheriff, a prisoner on execution, who has been permitted to go within the limits of the gaol liberties, on giving security for that purpose, this is not an escape, for which the old sheriff is liable, as long as the prisoner remains within the limits.

The right of the old sheriff to assign over prisoners on civil execution, to his successor in office, being for his own security and benefit, may be waived by him; but the prisoners not delivered over, are to be deemed, to all intents and purposes, as in his custody; and, in case of actual escape, he will be liable.

the plaintiffs to give any special matter, which might have been pleaded, in evidence, at the trial. The record of the judgment against *Brown*, in the court below, and the *ca. sa.*, and his arrest thereon, *were given in evidence; and it was proved that *L. H. Gansevoort* was appointed sheriff of *Albany*, on the 6th of *March* 1819, in the place of the defendant, *H.*; and *William Brown* was never in the custody of *G.*, the present sheriff, nor was he assigned to him by the defendant, when he delivered over the county and prisoners, nor at any time since. The indenture of assignment, from the defendant, to *G.*, the present sheriff, dated *March* 20, 1819, was given in evidence, by which it appeared that *Brown* was not named in it, or delivered over as a prisoner. It was proved that *G.*, the present sheriff, after the assignment, on being asked whether *B.* was in his custody, answered, that he was not, and had never been assigned to him verbally, or otherwise. After the commencement of the suit against the defendant, he admitted that he had forgotten to assign *Brown* to the present sheriff.

It was proved, that when *Brown* was first arrested on the *ca. sa.*, he gave to the defendant the usual bond, for the liberties of the goal, and was, thereupon, suffered to go within the limits of the goal liberties; and that he had never been seen beyond the limits, except on *Sundays*, and still continued within the limits of the gaol liberties; and it appeared that the omission to assign *Brown* with the other prisoners, to the new sheriff, was unintentional. The defendant moved for a nonsuit, in the court below; but the court decided, that it was not necessary for the plaintiffs, to enable them to recover, to prove that *Brown* had been off the limits of the gaol liberties since his arrest, or that he was off the limits when the suit was commenced against the defendant, and refused to nonsuit the plaintiffs: and the defendant excepted to the opinion of the court. The recorder charged the jury, that the evidence, in his opinion, was sufficient to entitle the plaintiffs to recover; and the jury found a verdict for the plaintiffs accordingly.

Foot, for the plaintiff in error, contended, that, notwithstanding the commission to the new sheriff, and the *supersedeas* to the old, and the delivery of the gaol and prisoners to the new one, a prisoner, not delivered over, but remaining in gaol, continued, in judgment of law, in the custody *of the old sheriff, and no action lies against him for an escape, until the prisoner in fact escapes. It is true, that such an omission of a prisoner by the old sheriff, is an inchoate escape; but it is not absolute, so as to give a right of action, until the prisoner has actually departed from the gaol.

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Buller (Nisi Prius, 68.) says, "When a new sheriff is appointed, his predecessor ought to deliver over all the prisoners in his custody, charged with their respective executions, and if he omit any, it is an escape;" and he cites, as his authority, *Westby's case, 3 Co. 71. Bacon (2 Bac. Abr. 517. tit. Escape in Civil Cases, E.)* says, "that the prisoners, until they are turned over to the new sheriff, remain in the custody of the old sheriff, and if he omits to deliver them over, every omission will be deemed an escape,

wherewith he will be chargeable ;" and he cites *Hob.* 266. 2 *Roll. Abr.* 457. *Cro. Eliz.* 365. *Bulst.* 70. *Leon.* 54. 4 *Co.* 72. But 4 *Co.* 72. is a mistake, and was; no doubt, intended for 3 *Co.* 72., which is *Westby's* case. *Cro. Eliz.* is *Westby's* case in the K. B. 2 *Roll. Abr.* 457. is not applicable, as it merely decides that, if a prisoner escapes while the old sheriff is in office, he is chargeable, not the new sheriff. *Westby's* case, which is reported, also, in 3 *Danv. Abr.* 114. pl. 3. 2 *Vin. Abr.* 152. *Moore*, 688. and *Popham*, 85. A. D. 1592, was this: The prisoner was in custody on two executions; one in favor of *Dighton*, and the other in favor of *Westby*. On going out of office, the defendants, the old sheriffs, assigned and delivered the prisoner to the new sheriffs, as in custody on the execution in favor of *D.* only. The prisoner actually escaped in the time of the new sheriffs, and the action was brought against the old sheriffs. The Court of K. B. decided against the old sheriffs, and said, "It was an escape in them presently; for the prisoner, when he is delivered to the new sheriffs for one cause, although he is in execution for one cause, he is not for the other; therefore it is an escape in the ancient sheriffs, and they are forthwith chargeable therewith." *Coke*, in his report of *Westby's* case, in the *Exchequer*, says, that four points were unanimously resolved: 1. "That where the body of *B.*, the prisoner, was delivered to the new sheriffs, as in execution at the suit of *Dighton* only, he was thereby *out of the custody of the old sheriffs; and he could not be in the custody of the new sheriffs for the plaintiff's (*Westby's*) execution, because he was not delivered to them, nor they charged with him for the plaintiff's execution." And to the question which was asked, "when the escape began in this case," it was answered and resolved, "that, *eo instanti*, that the old sheriffs delivered their prisoners to the new sheriffs, they cease to have the custody of any of them, and, *eo instanti*, doth the escape begin as to the plaintiff." 2. "It was resolved, that till the prisoners are delivered to the new sheriffs, they remain in the custody of the old sheriffs, notwithstanding the new letters patent, the writ of discharge, and the writ of delivery." This is the only case on which *Buller* relies, in support of his unqualified position, and it is one of those cited by *Bacon*.

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The next case cited by *Bacon*, is *Chandler v. Thompson*, (*Hob.* 266.) which did not concern this question; but in the debate on the subject, it was likened to "the case of a sheriff that doth not deliver the prisoner that he hath in execution to the new sheriff;" and the inference is, that if the old sheriff doth not deliver the prisoner to the new sheriff, he still remains sheriff as to him, so as to be chargeable as a sheriff for his escape. The next case cited by *Bacon*, is *Rex v. Morgan*, (*Bulst.* 70.) which merely decides, that if an old sheriff be removed before the return of a writ, the new sheriff is to make the return; and a reference is made to *Westby's* case, in which it was resolved, that, after the election of a new sheriff, and before delivery over to him of the prisoners, they do remain in the custody of the old sheriff. The case of *Smallman v. Lanes*, (2 *Leon.* 54.) decided in 1587, five years before *Westby's* case, is also cited by *Bacon*. A *capias* had been

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delivered to the new sheriff against *L.*, and he informed the court that *L.* was taken on an execution by the old sheriff, and held by him in prison at his own house, although all the other prisoners had been delivered to him; and, under the circumstances, he asked the advice of the court what return he should make. But no particular direction was given him by the court. *Anderson, J.*, held, that the new sheriff might return that *L.* was in his custody, *and so charge himself; "for although the office of the old sheriff be determined, yet there is not any escape, as long as the party be in custody, and not at large." *Periam, J.*, said, "It is an escape in the old sheriff, as soon as his authority is determined, and the prisoner not delivered." These are all the authorities cited for the doctrine as stated by *Bacon*; and it is submitted whether he or *Buller* are correct, or supported by the cases on which they rely.

But the matter was, afterwards, 1667, settled in the case of *Hanmer v. Winmer*, reported in *Sid.* 335. and 2 *Keble*, 224. The sheriff of *Gloucester* brought up *W.* on a *habeas corpus*, and moved the court for their advice; for *W.* was in execution when *B.* was sheriff, and was left in gaol when *C.* was appointed, but was not turned over by indenture to *C.*, nor by *C.* to the present sheriff, but still was in gaol, and had been charged with a new execution while the present sheriff was in office, who was attached to return both executions, and he prayed that he might not be compelled to return the old one; and the court were of opinion that he need not return it, and held unanimously, that *W.* was in the custody of *B.*, the first sheriff, although his body was in custody of the present sheriff, because he had never been delivered over by indenture; and the difference between this case and *Westby's* case, the court said, was, that there the prisoner was delivered over for one debt, but not for the other, and, therefore, there was an escape as to that other; and it was agreed by the counsel and the court, that *B.* should deliver *W.* over to the present sheriff, who should then make a return of both executions. In the case as reported in *Keble*, Chief Justice *Keeling* said expressly, that the omission by the old sheriff to deliver over the prisoner to *C.*, the second sheriff, was not an escape, so long as the prisoner remained in custody. In *Johnson v. Macon*, (1 *Wash. Rep.* 4.) decided in the Court of Appeals of *Virginia*, the suit was against the old sheriff for the escape of *S.*, a prisoner on execution, who had not been turned over by assignment, to the custody of the new sheriff; and the court held, that the plaintiff was bound to prove an *actual* escape of *S.*, from the custody of the defendant, for the *actual* escape is the gist of the action.

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Our statutes, on this subject, are similar to those of *England* *and the *English* decisions are, therefore, applicable. It may, perhaps, be said, that in *Hanmer v. Winmer*, the prisoner was in close custody. But the gaol limits or liberties, by our statute, are no more than an enlargement of the walls of the prison.

E. Baldwin, contra, insisted, that if the old sheriff omits to deliver over the prisoners in custody on execution, with their respective executions, to the new sheriff, every omission is an *escape*.

for which he is chargeable; and he relied on *Bull. N. P.* 68. 2 *Bac. Abr.* 517. and the cases there cited, and *Impey's Off. of Sheriff*, 212. 216. The delivery to the new sheriff ought to be by indenture; though the new sheriff may, if he pleases, accept the prisoners without an assignment. (*Com. Dig. tit. Sheriff*, B 3. *Dalton's Sheriff*, 16. *Cro. Jac.* 588.)

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After the writ of discharge is delivered to the old sheriff, his authority ceases; (2 *Dyer*, 355. a. *Comyn's Dig. tit. Sheriff*, B 3.) and if he omits to deliver any prisoner, by indenture, to the new sheriff, an action of escape lies against him. (2 *Leon.* 54. 3 *Com. Dig. tit. Escape*, B 2. *Westley v. Skinner and another*, *Cro. Eliz.* 366. S. C. 3 Co. 72.) The regular and proper, if not the necessary course, is, for the old sheriff to assign over, by indenture, his prisoners to the new sheriff; and this course has been recognized by this court. (*Richards v. Porter*, 7 *Johns. Rep.* 137. *Tallmadge v. Richmond*, 9 *Johns. Rep.* 85.)

It is objected, that an *actual* escape is necessary to make the sheriff liable. But in *Smallman v. Lane*, it is said, that "it is an escape in the old sheriff, as soon as his authority is determined, and the prisoner is not delivered." The true rule is, that the prisoner must be in the custody of a person having legal authority to confine him; and when the authority to detain ceases, the escape takes place. In *Dalton's Sheriff*, (p. 16. and cases there cited,) it is said, "If the sheriff hath one in execution for debt, in another man's house, (and not in the gaol,) and the new sheriff will not receive the prisoner at that house, but in the gaol, and after the old sheriff hath a writ of discharge delivered to him, then the prisoner is, presently, out of execution, and this is *an escape in the old sheriff; and if he sha^l detain after he has his writ of discharge, the prisoner may bring his action for false imprisonment against the old sheriff." So, "if a gaoler make a prisoner in execution a turnkey, and he goes on an errand and returns, it is an escape." (*Cas. temp. Hard.* 310.)

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If a woman is warden of the Fleet prison, and a prisoner marries her, it is a voluntary escape in the woman, for the prisoner cannot be under her power. (*Wood's Inst.* 77. 1 *Plowd. Com.* 37. a.) It is not the walls of the prison, but the prisoner's being in custody, that makes the prison. (*Hard.* 33.) The delivery of the sheriff, by a coroner, to the county gaol, and leaving him there, is an escape in the coroner. (6 *Johns. Rep.* 24. 9 *Johns. Rep.* 329. 1 *Bos. & Pull.* 24.) In *England*, every county has two gaols, one for debtors, which may be any house, where the sheriff pleases; and the other for criminals. By our statute, (1 *N. R. L.* 427. sess. 36. ch. 69.) (a) particular gaols are designated in each county, for the imprisonment both of debtors and criminals; and by the act concerning sheriffs, &c., (1 *N. R. L.* 422. sess. 36. ch. 67.) (a) the sheriffs of the several counties are required "to have the custody of the gaols and prisons, and the prisoners in the same, and to put in such keeper for whom they will answer." There cannot be two concurrent powers existing over the same prison. The

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case of *Johnson v. Macon* was governed by a statute of *Virginia*, and is not applicable here.

The doctrine of the common law, as laid down in the cases, is fully declared in the several statutes on the subject. In the first section of the act, (sess. 36. ch. 67. 1 *N. R. L.* 418.) (a) the form of commission to the new sheriff, and the writ of discharge to the old sheriff, is given; and it is made the duty of the latter to assign over the county, &c., by indenture to the former. The bond required by the same statute to be given by the sheriff, for the faithful performance of the duties of his office, is in force only "during his continuance in office." By the constitution, a sheriff cannot hold his office more than four years, and in the present case, the constitutional term of the old sheriff had expired, and his authority ceased.

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*Prisoners in execution may be brought up on *habeas corpus*, directed to the sheriff or keeper of the prison; but to whom would such a writ be directed in this case? Could the old sheriff take his prisoner again, if he actually escaped? Could he commit him to prison, if dissatisfied with the bond he gave under the provision of the act, for the liberties of the gaol? Would the sureties in such bond be liable, in any event, to the sheriff or the plaintiff, in case it was assigned? Has the gaoler a right to receive, or consider the party as a prisoner on execution? If a new execution should be issued against the prisoner, and delivered to the new sheriff, in whose custody would the prisoner be? If a writ of *habeas corpus* was delivered to the new sheriff, (the prisoner being in his custody also,) and the prisoner was removed, could the old sheriff avail himself of such writ, as a defence against an action for an escape?

Again; by the doctrine contended for by the plaintiff's counsel, the sureties for the gaol liberties would be deprived of the privilege of surrendering the prisoner in their discharge, as he is unknown to those having the custody of the gaol. If the plaintiff waits for an actual escape, which must refer back to a time when the defendant was sheriff, his right of action may be barred by the statute of limitations.

Upon delivering a writ to a sheriff against a prisoner, in actual custody, he is, by construction of law, immediately in custody on the second writ; (5 *Co.* 89.) but to whom is such writ to be delivered, in a case like the present? By the statute, (sess. 36. ch. 67.) every sheriff, officer, or keeper of any gaol, upon whom any copy of a declaration against a prisoner in his custody is served, must, in ten days thereafter, deliver it to the prisoner, under a penalty, &c. But to whom, in a case like the present, is a copy of a declaration to be delivered?

Again; the statute provides, in case of the death or removal of the sheriff, that the *under sheriff* shall execute his duties; and in case of the death or removal of both, the *coroner* shall execute the duties of the office, until a new appointment is made. This caution in providing for every possible contingency, shows that the legislature never intended *that a citizen should be deprived of his

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liberty, unless by an authorized and responsible officer. In case of the death of the present defendant, would the *escape* become complete, or who would have the custody of the prisoner?

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HEMPSTREAD
v.
WEED.

SPENCER, Ch. J., delivered the opinion of the court. It appears to me, that the court below erred. The case of *Westby v. Skinner and Catcher*, (3 Co. Rep. 71. and Cro. Eliz. 365.) is the leading case upon this subject; and a correct understanding of that case will show that there was no escape here. The bill of exceptions states, that the prisoner, *Brown*, had never left the limits; that he had kept the condition of his bond; and unless the omission, by the old sheriff, to assign him over to his successor, was, *per se*, an escape, there was no foundation for the action. In *Westby's* case, the debtor was in the defendant's custody, on two executions; one in favor of *Dighton*, the other in favor of *Westby*. The debtor was delivered over by the defendants, on their going out of office, by indenture, to the new sheriffs, on the execution at the suit of *Dighton* alone, omitting *Westby's* execution; and, after this assignment, the debtor escaped. It was unanimously resolved, by the court, that the delivery of *Bustard*, the debtor, to the new sheriffs, as in execution at the suit of *Dighton* only, he was thereby out of the custody of the old sheriffs; and he could not be in custody of the new sheriffs, on the plaintiff's execution, because he was not delivered to them, nor they charged with him, on that execution. It was further resolved, that, till the prisoners are delivered to the new sheriffs, they remain in custody of the old sheriffs, notwithstanding the new letters patent, the writ of discharge, and the writ of delivery. This case has been very much misconceived: thus, in *Buller's Nisi Prius*, 68. which is generally very correct, the case of *Westby* is supposed to decide, that if the old sheriffs omit to deliver over any of the prisoners, it is an escape. Other elementary writers have fallen into the same mistake, as to the points really decided in *Westby's* case, and the principle of that decision. The opinion of the court is so clearly expressed, that language can scarcely make it plainer. The old sheriffs, having assigned the prisoner, on one of the two executions *against him, had parted with the custody of him; but the new sheriffs, having received him on one of the executions only, had not the custody of the prisoner on the execution of which they had no knowledge; so that he was out of custody on that execution, as respected both the old and new sheriffs, and, consequently, it was a legal escape. But that very case decides an important point, which controls and governs this case; that, until the prisoners are delivered to the new sheriff, they remain in custody of the old sheriff, notwithstanding the commission of the new sheriff, and the writ of discharge and delivery.

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In this case, then, *Brown*, who was never assigned, or delivered to the new sheriff, remained in the custody of the plaintiff in error, and it is not pretended that he ever escaped. Whilst the law required prisoners in execution to be kept in *arcta et salva custodia*, within the four walls of the prison, there might be some question, whether, delivering over the gaol, and all the prisoners, except one

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or more, the old sheriff had any such control over those not delivered over, as that they might be considered in his custody. It would be liable to the objection, that it was a divided authority; but under the existing law, where the debtor charged in execution has a right to demand the gaol liberties, when he gives security and is admitted to these liberties, (which was the prisoner's case,) all conflict of power, over a prisoner thus circumstanced, between the old and new sheriff, ceases, and then there exists no difficulty in the case.

In fact, the right of the old sheriff to turn over his prisoners on civil executions, to his successor, is for his own safety and security; for we have seen, by the decision in *Westby's* case, that, until that is done, the prisoners remain in the custody of the old sheriff. There is, then, no want of authority on the part of the old sheriff, to retain the custody. The principle is unquestionable, that when a sheriff has once begun to execute a writ of execution, he has, after he goes out of office, a right to complete the performance of his duty. This consideration shows, that when the law authorizes the old sheriff to assign over his prisoners on execution, to his successor, it is that he may be exonerated from any further charge or responsibility. The rule is introduced for the benefit of the old sheriff, and he may, if he pleases, waive the advantage of it. Whether the old sheriff could commit the prisoner, if he ascertained that the sureties were bad, is another and distinct question; and should it be answered in the negative, it decides nothing as to the present case. It may be, that he could not commit to the gaol of the county; and this would be one of the risks and inconveniences in not assigning the prisoner. It was asked, whether, if *Brown* actually escaped, the old sheriff would be liable. Undoubtedly he would be; for, as regards this prisoner, he is to be deemed, to all intents and purposes, as in the custody of the old sheriff.

Judgment reversed

WARNER and others against RACEY.

IN ERROR, on *certiorari* to a justice's court.

The bond taken from a constable, with sureties, under the act, (2 N. R. L. 126. sess. 36. ch. 35.) (a) should be made to the people of the state of New-York. (b)

Though a constable neglects to return an execution for above thirty days, it is no breach of the condition of a bond taken pursuant to the statute, unless money has come to his hands, on account of such execution, which he has neglected or refused to pay over.

Racey sued the plaintiffs in error before a justice, on a bond given by *Warner*, as constable, and *M'Kinney* and *Sturges*, the other plaintiffs in error, as his sureties. The defendants below pleaded the general issue. On the trial, the plaintiff below proved that an execution had been delivered to *Warner*, as constable which he had neglected to return, for upwards of thirty days. He then proved the execution of the bond by all the defendants below, "to the people of *Niagara* county," conditioned for the payment of "all sums of money which shall come into the said *Warner's* hands for collection by way of execution." The bond, as directed

(a) 1 Rev. Stat. 346.

(b) Vide *The People v. Holmes*, 5 *Wendell's Rep.* 191. *Same v. Same*, 2 *Ibid.* 281.

to be taken by the statute, (2 N. R. L. 126. sess. 36. ch. 35.) (a) is, "to pay to each and every person such sum of money as the said constable shall become liable to pay, for or on account of any execution which shall be delivered to such constable for collection." It was proved that, in fact, no money was collected on the execution; but that the constable took the body of the debtor, &c. But the jury found a verdict for the plaintiff below, on which the justice gave judgment.

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**Per Curiam.* The bond is not according to the statute; and, if it were, there is no evidence of any breach, *for no money has come to the hands of the constable, &c.* Though the statute is silent in that particular, yet we think the bond should be made to the people of the state of New-York. The judgment must be reversed.

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Judgment reversed.

(a) 1 Rev. Stat. 346.

BUSTER against NEWKIRK.

IN ERROR, on *certiorari* to a justice's court.

Newkirk brought an action of *trover* against *Buster* for a deer-skin. It appeared that *N.* was hunting deer on the 31st of December, 1819, and had wounded one, about six miles from *B.*'s house, which he pursued with his dogs. He followed the track of the deer, occasionally discovering blood, until night; and on the next morning resumed the pursuit, until he came to *B.*'s house, where the deer had been killed the evening before. The deer had been fired at by another person, just before he was killed by *B.*, and fell, but rose again, and ran on, the dogs being in pursuit, and the plaintiff's dog laid hold of the deer about the same time, when *B.* cut the deer's throat. *N.* demanded the venison and skin of *B.*, who gave him the venison, but refused to let him have the skin. The jury found a verdict for the plaintiff for seventy-five cents, on which the justice gave judgment.

Though property in an animal, *feræ naturæ*, may be acquired by occupancy, or by so wounding it as to bring it within the power and control of the pursuer; yet if, after wounding the animal, the party continues the pursuit until evening, and then abandons it, though his dogs continue the chase, he acquires no property in it.

Per Curiam. The principles decided in the case of *Pierson v. Post* (3 Caines's Rep. 175.) are applicable here. The authorities cited in that case establish the position, that property can be acquired in animals *feræ naturæ*, by occupancy only; and that, in order to constitute such an occupancy, it is sufficient if the animal is deprived of his natural liberty, by wounding, or otherwise, so that he is brought within the power and control of the pursuer. In the present case, the deer, though wounded, ran six miles; and the defendant in error had abandoned the pursuit that day, and the deer was not deprived of his natural liberty, so as to be in the power or under the control of *N.* He, therefore, cannot be said to have had a property in the animal, so as to maintain the action. The judgment must be reversed.

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Judgment reversed.

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BOYD
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HITCHCOCK.

BOYD and SUYDAM against HITCHCOCK.

Where a debtor gives his note, endorsed by a third person, as further security, for a part of the debt, which is accepted by the creditor, in full satisfaction of all demands, it is a valid discharge of the whole debt, and it may be pleaded in bar, as an accord and satisfaction. (a)

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THIS was an action of *assumpsit*, for five thousand dollars. The declaration contained counts for goods, wares and merchandises, sold and delivered, for *five thousand dollars*; and a *quantum valebant* thereon; the usual money counts for the like sum; and an *insimul computassent*, &c. The defendant pleaded, 1. *Non assumpsit*; 2. Payment; 3. "That, after making the said promises and undertakings, in the said declaration mentioned, and before the commencement of the suit, to wit, on the 7th of *August*, 1818, at the city of *New-York*, he, the defendant, caused to be delivered to the plaintiffs his three several promissory notes, made payable to *David W. Childs*, for 916 dollars and 67 cents each, dated *May* 18, 1818, and by him endorsed to the plaintiffs; one of the said notes payable in twelve months, one in eighteen months, and the other in twenty-four months, in full satisfaction and discharge of the said several promises and undertakings, in the said declaration mentioned, and of the damages sustained by the plaintiffs, by reason of the non-performance of the said promises and undertakings; and which said notes they, the plaintiffs then and there, accepted and received, of and from the defendant, in full satisfaction and discharge of the said promises and undertakings, &c. 4. That the defendant delivered to the plaintiffs, three several promissory notes, made and endorsed as described in the third plea, in full satisfaction and discharge of all promises and undertakings, made by the defendant to the plaintiffs, up to the said 18th of *May*, 1818, without this, that the defendant had assumed or promised to pay the plaintiffs *any sum or sums of money, since the said 18th of *May*, 1818, in manner and form, &c.; wherefore he prayed judgment," &c.

There was a *demurrer* to the third and fourth pleas, and joinder in demurrer. The *fourth* plea was, afterwards, abandoned by the defendant's counsel as indefensible.

Henry, in support of the demurrer. • He cited 5 Co. 117. Co. Litt. 212. b. 5 East, 230. 1 Str. 426. 2 Term Rep. 24. 2 Johns. Rep. 448. 17 Johns. Rep. 169. 2 Chitty's Pl. 435, 436. note m. 15 Johns. Rep. 247.; and contended, that a simple note of a debtor cannot be deemed a satisfaction of a debt, unless expressly averred to be paid. A less sum may be a satisfaction of damages, but not of a debt *in numero*; nor can it be pleaded in bar of an action for a debt. Again, it does not appear that the note, in this case, was a negotiable note.

Lynch, contra, cited 5 Term Rep. 513. 517. 1 Johns. Rep. 37. 2 Johns. Cas. 432. 3 Johns. Cas. 71. 5 Johns. Rep. 68. 6 Cranch, 253. 261. 1 Johns. Rep. 34. 8 Johns. Rep. 15. 10 Johns. Rep. 105. 1 Salk. 133. 3 Johns. Rep. 439. 15 Johns. Rep. 241. 12 Johns. Rep. 90. 4 Mod. 88. He contended, that

(a) Vide *Booth v. Smith*, 3 Wendell's Rep. 66. *Le Page v. McCrea*, 1 Ibi. 164.

by the *English* authorities, a *negotiable* note, given for a simple contract debt due, was a discharge of such debt. And this court have recognized the rule, but have added a qualification, that the party must deliver up and cancel the note, if he means to proceed on the original contract. The acceptance of the note is deemed, at least, *prima facie* evidence of a satisfaction; and where it is expressly so agreed, it is payment; and it makes no difference whether it is the note of the defendant, or of a third person. From the description of the notes in the plea, as having been *endorsed* by the payee, it is necessarily to be inferred that they were negotiable. But, if they are not to be deemed negotiable, yet, as *Childs*, the endorser, would be liable to the endorsee, for the amount, they must be regarded as a satisfaction of the original debt.

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The defendant was not bound, in his plea, to aver payment of the notes. Whether they have been negotiated and *paid, must be known to the plaintiffs. Again, it being averred that the notes were given and accepted in full satisfaction and discharge, it will be intended that they were for the full amount of the plaintiffs' demand. But if the amount of the notes were less than the original demand, the additional security by the endorsement of *Childs*, is a sufficient consideration for the discharge of the balance; and it would be a fraud on *Childs*, if the plaintiffs were permitted to recover the balance of the defendants. (2 *Camp. N. P. Rep.* 126. 384. 11 *East*, 390.)

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PLATT, J., delivered the opinion of the court.

The question is, whether the third plea sets out such an *accord and satisfaction* as will bar the action.

The general rule is well settled, that the payment of a less sum of money than the whole debt, *without a release*, is no satisfaction of the plaintiff's claim. (*Cumber v. Warn*, 1 *Stra.* 426. *Harrison v. Wilcox* and *Close*, 2 *Johns. Rep.* 449. *Fitch v. Sutton*, 5 *East*, 232. *Seymour v. Minturn*, 17 *Johns. Rep.* 169.) And a mere agreement to accept less than the real debt, would be *nudum pactum*. (*Heathcote v. Crookshanks*, 2 *Term Rep.* 24.) But, in my judgment, this case is distinguishable from the cases cited. Here was a *beneficial interest* acquired, and a *valuable consideration* received by the plaintiffs, when they agreed to accept less than their whole demand. The plea avers that three promissory notes, drawn by the defendant, payable to *David W. Childs*, and by him endorsed, were delivered to the plaintiffs, and by them accepted and received from the defendant, in full satisfaction and discharge of the promises stated in the declaration. It would be an abuse of terms to call this a mere *nudum pactum*. Here was *inconvenience* to the defendant, in procuring a surety; and also a *benefit* to the plaintiffs. The defendant held the notes, with *Childs's* endorsement, and offered them, to secure 2,750 dollars of the debt, if the plaintiffs would relinquish the residue of their claim. It is to be inferred, that *Childs* lent his endorsement for the sole purpose of effecting this compromise. The plaintiffs accepted the notes as payment of the whole debt; and, I think,

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good faith and sound principle require that *this should be deemed a valid accord and satisfaction, to bar the plaintiff's action. It would operate as a fraud upon *Childs*, the endorser, whose means of reimbursement from the defendant would be greatly impaired, if this plea be not sustained. If *Childs* had been the maker, and *Hitchcock* the mere endorser, the case, as to him, (*Childs*,) would be widely different; for if *Childs*, as a real debtor, had made the notes, it would be immaterial to him whether he paid them to *Hitchcock* or to his endorsees. But, independent of the consideration due to the surety, I am of opinion, that if a debtor offers *additional security*, on condition that his creditor shall give up a portion of the debt, and the creditor accepts such security for a less sum, as a satisfaction for the whole debt, it is a valid discharge, on the ground of accord and satisfaction. (*Sheehy v. Mandeville, &c.*, 6 *Cranch*, 253.)

In the case of *Fitch v. Sutton*, (5 *East*, 231.) Lord *Ellenborough* said, "It is impossible to contend that acceptance of 17 pounds, 10 shillings, is an extinguishment of a debt of 50 pounds. There must be some consideration for the relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim; otherwise, the agreement is *nudum pactum*; but the mere promise to pay the rest when of ability, put the plaintiff in no better condition than he was before."

In the case of *Steinman v. Magnus*, (11 *East*, 390.) Lord *Ellenborough* said, "It is true, that, if a creditor simply agree to accept less from his debtor than his just demand, that will not bind him: but if, upon the faith of such an agreement, a third person be lured in to become surety for any part of the debt, on the ground that the party will be thereby discharged of the remainder of his debt, the agreement will be binding." Here, the plaintiffs have, in fact, "*lured in*" Mr. *Childs*. They agreed to purchase his endorsement, and the price to be paid for it was the portion of the debt which they agreed to relinquish to *Hitchcock*; and why shall they not pay the price, as well as enjoy the benefit, of that contract?

I am of opinion that the defendant is entitled to judgment on the demurrer.

Judgment for the defendant

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*LYNDE against NOBLE.

A *certiorari* will not lie, to remove into this court proceedings commenced before a judge of the Court of Common Pleas, under the act of the 13th of April, 1820, "to amend the act, entitled, An act concerning distresses, rents, and the renewal of leases," (sess. 43. ch. 194.) (a) until the case has been finally tried, and judgment given thereon, before the judge of the Court of C. P.; nor will a writ of *certiorari*, though issued after judgment, stay the writ of restitution of possession, in such case. (b)

DAVIS, for the plaintiff, moved to quash the *certiorari* in this cause, on the ground of its having been irregularly issued. It appeared that the *certiorari* had been issued to remove certain proceedings commenced before the Court of Common Pleas of *Courtlandt* county, instituted by *Lynde* against *Noble*, under the

(a) 2 *Rev. Stat.* 500, 505.

(b) *Vid. Munro v. Baker*, 6 *Cow. Rep.* 396.

act passed April 13, 1820, (sess. 43. ch. 194.) (a) entitled, "An act to amend an act, entitled, An act concerning distresses, rents, and the renewal of leases, passed April 5, 1813, and for other purposes." *L.* made oath in writing, before *Townsend Ross*, Esq., one of the judges of the Court of Common Pleas, pursuant to the act, stating that *N.* was his tenant of a certain farm, &c. in *Homer*, &c.; that the term of *N.*, in the premises demised, expired the 10th of *March*, 1822; and that 140 dollars of the rent was due to him, and unpaid by *N.*, who continued in possession of the premises after the expiration of the term. The judge thereupon issued a summons, requiring *N.* forthwith to remove from the premises, or to show cause, before him, on the 14th of *March*, 1822, at, &c. why the said *L.* should not be put in possession of the premises. At the time and place appointed, *N.* appeared before the judge who issued the summons, and made oath, under the second section of the act above mentioned, stating, in substance, that the contract under which he held the premises in question was usurious, and, therefore, as he was advised by counsel, void; and, consequently, that he (*N.*) did not hold or claim the premises contrary to an agreement then existing between him and the said *L.*, and that he owed nothing for the rent of the premises. It was objected, on the part of *L.*, that the affidavit was insufficient to entitle *N.* to a jury; but that he (*N.*) ought to swear positively, that he did not hold and claim the premises contrary to an agreement then existing between him and *L.*; and it was not sufficient to state it inferentially, or by advice of counsel. The judge overruled the objection, and issued his precept to the sheriff of the *county, commanding him to summon a jury to appear before him, the said judge, agreeably to the provisions of the said act, at, &c. The parties again appeared before the judge, at the time and place appointed, and the sheriff returned the precept, with the names of the jurors summoned by him, and who, being called, appeared. The counsel for *N.* then produced a writ of *certiorari*, which had been allowed by *E. Miller*, Esq., first judge of the Court of Common Pleas of *Cayuga* county, on the 13th of *March*, 1822. It was insisted, on the part of *L.*, that the *certiorari* was not a *supersedeas* to the proceedings before the judge, which could not be removed by *certiorari*, until the jury had passed upon the case, and it had been tried before the judge. And the judge, being of that opinion, proceeded in the trial; and, the jury having been sworn, *L.* produced a lease executed by him and *N.* of the premises in question, for one year, ending the 10th of *March*, 1822, for one hundred and forty dollars rent, and which *N.* agreed to pay. The execution of the lease was proved, and that *N.* had been in possession of the premises during the preceding year, and that he remained in possession on the 13th of *April*, 1822. The jury gave a verdict, "That the said *Solomon Noble* did hold and claim the premises in question, contrary to an agreement then subsisting between him and the said *Charles W. Lynde*." But the judge declined issuing his warrant to put the plaintiff in possession of the premises,

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until he had the opinion of this court upon the regularity of the proceedings.

Van Ness, for the defendant, contended, that, wherever a jurisdiction is given in an inferior court as to the possession of land, the party has a right to have the question tried in this court. And for that purpose, it was necessary that a *certiorari* should lie before a trial or decision below. The act of April 13, 1820, confers very great and extraordinary powers, and ought to be construed with great strictness. The proceedings under this act are analogous to those under the act to prevent forcible entries and detainers, in regard to which this court decided, that the party was entitled to a *certiorari*, as a matter of course. (*People v. Runkel*, 6 Johns. Rep. 334.)

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**Davis*, in reply, said, that, until there was a decision in the court below, by which the party was aggrieved, there could be no ground for a *certiorari*. The act gives the Court of Common Pleas jurisdiction to try the question, whether tenant or not. This, by necessary implication, takes away the remedy by *certiorari*, until there has been a trial and decision on that question. Until then, there is nothing to be removed to this court.

WOODWORTH, J., delivered the opinion of the court. This is an application to quash the writ of *certiorari*, issued to remove certain proceedings, commenced under the "act to amend the act concerning distresses, and for other purposes," passed the 13th of April, 1820. (a)

Before the passing of this statute, the remedy to recover possession, where the tenant held over, was expensive and dilatory. The legislature have prescribed a summary proceeding, calculated to secure the rights of parties, and insure a speedy decision. This remedial act must be construed liberally, to carry into effect the intent by suppressing the mischief, and advancing the remedy.

If a *certiorari* will remove the proceedings into this court, before a trial is had before the judge authorized to try the question of possession, there is nothing gained by the statute; for the tenant, by that course, may delay the landlord as long as he could before the passing of the act, and subject him to, at least, equal expense. Such a construction would, virtually, be a repeal of the statute. Its provisions would become useless, if the complaint, as soon as it was made before the magistrate, might be brought into this court for trial. In the present case, *Lynde* made application for process, on the 12th of March; a summons issued on that day; and the *certiorari* was allowed on the 13th of March. There had been no trial, order or judgment. The sound construction of the statute is, that the proceedings must be conducted to trial and judgment, in the inferior tribunal.

It is admitted, that this court possess, by the common law, authority to award a *certiorari*, not only to inferior courts, but to persons invested by the legislature with power to decide on the

(a) 2 Rev. Stat. 500, 505.

property or rights of the citizen, *even in cases where they are authorized by statute finally to hear and determine; and this power can only be taken away by express words. (*Lawton v. Commissioners of Highways*, 2 *Caines's Rep.* 182. 8 *Term Rep.* 542.)

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The necessity of a superintending power *to revise the proceedings and correct the irregularities* committed by inferior officers, cannot be questioned; this is its legitimate office; it does not, before trial, withdraw the question to be tried from the inferior jurisdiction, but may, subsequently, cause it to be reviewed. When this *certiorari* was granted, there had been no order, judgment or trial; the magistrate had performed a ministerial act only; he had administered an oath, and issued a summons. By allowing a *certiorari*, the superior tribunal would assume an original jurisdiction, instead of a power to review and correct.

I have not met with any case where, in a civil proceeding before an inferior magistrate who has express jurisdiction by statute, a *certiorari* has been held to lie, to remove the issue or question to be tried by the magistrate to the Supreme Court.

In 1 *Bac. Abr.* tit. *Certiorari*, 560. and 2 *Hawk. P. C.* ch. 27. s. 30. it is stated, as a good objection against granting a *certiorari*, that issue is joined, and a *venire* awarded for the trial in the court below. It has been urged, that the practice in this case is analogous to that under the act to prevent forcible entries and detainers, where the proceedings may be removed into this court for trial. It will be seen, however, that there is no analogy. The fifth section of that statute provides, that if the traverse taken by the person indicted, either before the justice, or before the justices of the Supreme Court, in case the proceedings be removed into the Supreme Court, before such trial, then restitution shall be allowed, in the same manner as if no plea or traverse had been put in by the person indicted. It also provides for the payment of costs by the party convicted, to be assessed by the justices of the Supreme Court, if the proceedings shall be removed. The provisions of the act, by implication, allow a removal. The obvious construction is, that, when a person is indicted, he has an election as to the court before whom the traverse shall be tried. The statute evidently intended *to confer that right, by prescribing the form of proceeding subsequent to removal. The uniform practice under it has been to issue a *certiorari*, of course, when applied for, without showing special cause. (*People v. Runkel*, 6 *Johns. Rep.* 334.) The statute is construed as authorizing the removal before trial. The common law does not extend to it: although the proceedings, in form, are of a criminal nature, it is only a civil remedy for the recovery of possession. Admitting, however, that, at common law, a *certiorari* would lie, to remove proceedings under the act to prevent forcible entries and detainers, it must rest on the ground that the proceeding, by indictment, is of criminal jurisdiction, and that this court may award a *certiorari* to have any indictment removed and brought before itself. When applied for by a defendant, the court have a discretionary power, *on special cause shown*, to grant or refuse it; but it is awarded, of right, at the

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instance of the king. (1 *Bac. Abr.* tit. *Certiorari*, 559.) It is evident that the writ is not issued on this ground, for no special cause is required to be shown. Whether the proceedings under the act to prevent forcible entries are considered as merely a civil remedy, or of criminal jurisdiction, it is plain the *certiorari* is authorized by the statute. The case now before the court is a civil proceeding only, where the party attempts, by *certiorari* allowed before trial, to evade the jurisdiction conferred by statute on the inferior tribunal. This practice cannot be supported; and we are of opinion, that the writ of *certiorari* will not lie, to remove proceedings instituted under this statute, until the case is finally adjudicated; and even then it will not stay the writ of restitution, and, consequently, the *certiorari* must be quashed.

Motion granted.

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*JACKSON, *ex dem.* Wood and others, against SWART.

W. . being seised of land, be, together with his wife, for the consideration of 500 dollars, conveyed the same to their son, J., his heirs and assigns, forever; "reserving to themselves the use of the premises, during their natural lives." W., the grantor, died: Held, that the deed could not operate as a reservation or exception in favor of the wife, who had survived, but that it was valid and effectual, as a covenant to stand seised to the use of the grantor himself, during life, and after his death, to the use of his wife, for life.

A bargain and sale, for a pecuniary consideration of a fee, to commence in futuro, will operate as a covenant to stand seised to the use of the persons within the consideration, according to the intention of the party, without any technical or formal words for that purpose. (a)

EJECTMENT for five acres of land in *Gorham*, in the county of *Ontario*, tried at the *Ontario* circuit, before Mr. Justice *Yates*, in *June*, 1821. *James Wood*, who was the husband of *Jerusha Wood*, one of the lessors, and the father of *James*, *Henry* and *Gilbert Wood*, the other lessors, died in possession of the premises, about six years before the trial, leaving four sons, viz. the three lessors above named, and *Joseph Wood*, his heirs at law. *James Wood*, the elder, and his wife, had resided on the premises, for about fifteen years before his death.

The defendant gave in evidence a deed from *Benjamin Allen* to *James Wood*, the elder, dated *November 8*, 1790, for the premises in question; and also a deed from the said *James W.* and his wife, to *Joseph Wood*, above mentioned, dated *December 6*, 1809, for the consideration of five hundred dollars, by which the grantors granted, bargained, sold, remised, released, aliened and confirmed, unto the said *Joseph W.*, his heirs and assigns, forever, seventy-four acres and one quarter of land, including the premises in question. Immediately following the description of the premises in the deed, were these words: "It is understood, that the parties of the first part reserve to themselves the use of the premises during their natural lives." The deed contained a covenant of warranty, in the usual form. *Joseph W.*, the grantee, at the time of the execution of the deed, was the infant son of the grantors, being then about 15 years of age. The defendant then gave in evidence a deed for the premises in question, dated *March 6*, 1817, from *Joseph Wood* and his wife to him. A verdict was taken for the plaintiff, subject to the opinion of the court, as to the operation of the deed from *James Wood*, the elder, and his wife, to *Joseph Wood*.

(a) Vide *Jackson v. McKenney*, 3 *Wendell's Rep.* 233

Kirkland, for the plaintiff, contended, 1. That the deed from *James Wood* and his wife, to their son, *Joseph Wood*, *was for a freehold to commence *in futuro*, and, therefore, void. 2. That if the deed was not void, it must be construed according to the plain intent of the parties, as expressed in the deed; and that the lessor, *Jerusha Wood*, who had survived, had a life estate in the premises. (*Plowd.* 300. *Cruise's Dig.* 32. ch. 12. s. 6—13. 2 *Wils.* 75. 1 *Johns. Cas.* 91. 11 *Johns. Rep.* 337. *Shep. Touchst.* 107. *Cruise's Dig.* tit. 22. ch. 12. s. 23. 16 *Johns. Rep.* 110.)

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J. C. Spencer, contra. The clause in the deed, reserving the use of the premises for the lives of the grantors, is not a *reservation*, which is defined by *Coke* (*Co. Litt.* 47. a.) to be "always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised." Here was no rent, service or estate newly created. An *exception* is always a part of the thing granted, and of a thing *in esse*. If any thing, this was an exception; and, if so, it is void, as being repugnant and uncertain. *Shepherd*, in his *Touchstone*, (p. 78, 79.) mentions the requisites essential to constitute a good exception. It must be part of the thing granted; it must be of such a thing as is severable from the thing granted; it must be of such a thing, as the person in whose favor it is made may have it. Now, the wife, in this case, could have no part of the estate as properly belonging to her. After the grant in fee of the whole estate, a part, or residuary part thereof, cannot be reserved. (2 *Bl. Com.* 164. *Plowd.* 152. 3 *Bac. Ab.* 383. tit. *Grant. Bac. Ab.* tit. *Conditions*, L. *Thompson v. Gregory*, 4 *Johns. Rep.* 81.) Besides, the exception is void for uncertainty. Can the wife of *James Wood* take, without being a grantee, or named as such? She executed the deed merely to release her dower, as wife of the grantor. (*Hornbeck v. Westbrook*, 9 *Johns. Rep.* 73. 12 *Johns. Rep.* 199.)

SPENCER, Ch. J., delivered the opinion of the court.

The questions to be decided, are, 1st, whether the deed from *James Wood* and *Jerusha* his wife to *Joseph Wood*, is void, as conveying a fee to commence *in futuro*; and, 2d. whether the reservation to *Jerusha Wood*, of an estate for *life, is valid and operative. The consideration expressed in the deed, as between the grantors and the grantee, is 500 dollars; and the deed contains the words "grant, bargain, sell," &c.; and, after describing the premises granted, are these words: "*It is understood that the parties of the first part reserve to themselves the use of the premises during their natural lives.*"

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It appears that *James Wood*, the grantor, was solely seised of the premises, his wife having no interest therein, except an inchoate right of dower. The lessors are *Jerusha*, the widow of *James Wood*, he having died in possession six years since, and three of the children of *James Wood*.

On the first point, there can be no doubt, that the deed operated as a covenant to stand seised, if the estate of the grantee, *Joseph*, was to take effect after the deaths of *James Wood* and his wife.

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It was expressly decided, in *Jackson v. Dunsbagh*, (1 *Johns. Cas.* 91.) that a deed of bargain and sale, founded on a pecuniary consideration, to take effect *in futuro*, was effectual. This principle was again recognized in *Jackson v. Staats*; (11 *Johns. Rep.* 351.) and it is fully explained in 2 *Saund.* 96. n. 1., where the cases are referred to, and in 4 *Cruise's Digest*, p. 185—193.

It has been insisted, that *Jerusha Wood* took nothing by the deed, in the event of her surviving her husband, on the ground that an exception or reservation in a deed, in favor of a third person, who had no title or interest in the land, is inoperative. The position that a reservation or exception in favor of a stranger is ineffectual, is undoubtedly true. It is founded on the same principle, that, upon a bargain and sale, a use cannot be limited to any other person than the bargainee. The deed in question cannot operate by way of an exception or reservation, in favor of *Jerusha Wood*. (3 *Barnewall & Alderson*, p. 66. *Co. Lit.* 47. a. 4 *Cruise*, 46.) But it has effect and operation as a covenant to stand seised, and is within the principles adopted in *Bedell's* case, (7 *Co.* 133.) and in *Goodtitle v. Petto*, (2 *Str.* 934.) In *Bedell's* case, the facts were, that *B.* was seised, and he and his wife, in consideration of the natural affection and paternal love which he had to his sons, *James* and *Michael*, *and for their better preferment and advancement, covenanted to stand seised of the premises conveyed, to the use of himself for life, and, after his decease, to the use of his wife for life; and, after their deaths, of one moiety to the use of one son, and of the other moiety to the use of the other son, in tail. The question was, whether any use arose to the wife, or not; and it was resolved, that if a man covenant to stand seised to the use of his wife, son or cousin, it shall raise a use, without any express words of consideration; and, upon writ of error, the judgment was affirmed by all the judges of the Common Pleas, and barons of the Exchequer. The case of *Goodtitle v. Petto* was adjudged on the same principle. Again; in *Paget's* case, (1 *Co. Rep.* 154. a.) it was decided, that, upon a covenant to stand seised, a use will arise to those who are within the consideration, though no use will arise to those who are strangers to it. It is scarcely necessary to observe, that, in such a conveyance, no technical words are required; such as that the grantor covenants to stand seised, to the use of *A.*, &c.; but any other words will create a covenant to stand seised, if it appears to have been the intention of the party to use them for that purpose. (*Willes' Rep.* 676.) That it was the intention of *James Wood*, in the deed to which he and his wife were parties, to make provision for her in case she survived him, by securing to her the enjoyment of the premises during her life, is unquestionable. The deed, then, though it is a valid one, will not take effect until after the death of *Jerusha Wood*; and the plaintiff is, therefore, entitled to recover on that demise.

Judgment for the plaintiff.

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M'AULEY

v.

BILLENGER.

***M'AULEY against BILLENGER and others.**IN ERROR, on *certiorari* to a justice's court.

B., and the other defendants in error, sued *M'Auley* before the justice, to recover the first instalment of a sum subscribed by him for the repairs of a church. The defendants in error, at a meeting held at Union Church, in *Danube*, were appointed a committee to receive subscriptions, and to contract for the repairs of that church, in the manner specified in a written paper, the subscribers to which promised to pay to the committee, or either of them, the sums by them respectively subscribed, in four equal instalments, the first of which was to be paid when the subscription commenced. The subscription paper concluded, as follows: "Provided, nevertheless, that no person shall be obliged to pay the sum which he subscribes, unless a sufficient sum can be raised to repair said church." The plaintiff in error subscribed 25 dollars; the paper was also signed by sixteen other persons, and the whole amount subscribed was about 600 dollars. The defendants in error, by an agreement under seal, contracted with a person to make the repairs for 1200 dollars; and the contractor agreed to receive the subscription paper, in part payment, and to collect the sums subscribed, at his own risk, and without recourse to the defendants in error. And it was further agreed, that the contractor, in order to raise the residue of the money, was to have the privilege of selling a sufficient number of the pews for that purpose. The repairs having been commenced, the plaintiff in error was requested to pay the first instalment of the sum subscribed by him, but he refused, and the suit below was brought to recover that amount. The justice gave judgment against the plaintiff in error, for six dollars and twenty-five cents.

M., with others, signed an instrument, by which he engaged to pay a sum, subscribed by him, to *B.* and others, a committee appointed by the members of a church, to obtain subscriptions, and contract for the repairs of the church; and the instrument contained a proviso, "that no person should be obliged to pay the sum which he subscribed, unless a sufficient sum was raised to repair the church." The committee entered into a contract with a person to make the repairs, for a specific sum, who engaged to take the subscriptions, being about one half of that sum, in payment, and to raise the residue by a sale of the pews, which he was authorized to make:

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Held, that this was a compliance with the condition of the subscriptions, and that *M.* was liable to pay the sum subscribed by him.

Per Curiam. The plaintiff in error voluntarily entered into a contract, by which he engaged to pay to the defendants in error twenty-five dollars, for the purpose, and in the manner specified in the instrument to which he subscribed his name. The consideration for his promise was the repairing of the church. By signing the subscription, he sanctioned the acts of the meeting in resolving to make the repairs, and in the appointment of the committee for that purpose; and he moreover recognized the authority of the committee to receive the subscription money, and to contract for the repairs. The only question, then, is, whether the condition, on which the sum subscribed was to be paid, has been fulfilled on the part of the defendants in error. They contracted for the repairs, at a specified sum; and the person with whom they contracted, covenanted, on his part, to receive the balance of that sum, over and above the amount subscribed, in the proceeds of the sale of pews, which he was authorized to make. The payment of the whole sum was provided, and could be raised, according to the meaning of the condition of the instrument subscribed, without having recourse to the defendants in error. The

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terms of subscription were, therefore, complied with ; and the defendant below was liable to pay the instalment for which judgment was rendered against him in the court below.

Judgment affirmed.

HOOKER against CUMMINGS.

Rivers are to be considered navigable, as far

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as the sea ebbs and flows ; and so far the right of fishing, as well as of navigation, is common to all ; and in rivers not navigable, in that sense, or above the flow and reflow of the tide, the adjoining proprietors of the soil have the exclusive right of fishing opposite their land, to the middle of the river ; but the public have an easement, or servitude, in such rivers, as highways, for passing and repassing with boats, &c. And all rivers which are, in fact, navigable, whether above the flow of the sea, or whether unaffected by the tide, in their whole extent, are, in regard to their use, public rivers, and subservient to the public use and accommodation, and subject to regulation by the legislature. (a)

The fishery in Salmon river, in the county of Oswego, employing into lake

Ontario, and in which there is no ebb and flow of the tide, is not free or common to all ; but belongs, exclusively, to the owners of the adjacent land.

THIS was an action of *trespass*. The declaration contained five counts. The *first* count charged, that the defendant, *vi et armis*, broke the plaintiff's close, (in the *town of *Richland*, in the county of *Oswego*,) covered with water, and did, then and there, fish in the said close, and the fish, to wit, 300 salmon, 300 trout, &c., of great value, &c., then and there found, caught, took, and carried away, &c. The *second* count charged, that the defendant broke and entered the plaintiff's several fishery in the river, called *Salmon* river, situate in *Richland*, in the county of *Oswego*, and then and there fished in the said fishery for fish ; and the fish, to wit, 300 salmon, &c. then and there found, and being of great value, &c., caught, took, and carried away, &c. The *third* count charged, that the defendant fished in the plaintiff's free fishery in the said town, &c., and 300 salmon, &c., then and there being, caught, took, and carried away, &c. The *fourth* count was for taking and carrying away the plaintiff's fish, specifying the time, place, kinds, and value, &c. The *fifth* count was for breaking the plaintiff's close, at, &c., and treading down the plaintiff's grass and herbage there growing, &c.

The defendant pleaded, 1. Not guilty. 2. As to breaking and entering the plaintiff's close in the *first* and *fifth* counts mentioned, the defendant pleaded, that they were one and the same close, and not other or different ; and that, before and at the said several times when, &c. there was a common and public highway into, over, through and along the said close, in which, &c., for all the citizens of this state to pass and repass ; wherefore the defendant, being such citizen, at the said times, when, &c., passed over and along the said close, in, by and along the said highway, then using the same as he lawfully might do, which are the same supposed trespasses in the introductory part of the first plea mentioned, &c. with a verification, &c. 3. And for further plea as to the fishing in the plaintiff's close in the *first* count mentioned, and catching, taking, and carrying away the fish, &c.; and as to the fishing in the several fishery of the plaintiff in the *second* count mentioned &c. &c.; and as to fishing in the plaintiff's free fishery in the *third* count mentioned, &c. &c. &c.; and also as to catching, taking, &c. the fish of the plaintiff in the *fourth* count mentioned, by leave, &c., he said, that the plaintiff ought not to have or maintain his action thereof against him, because, he said, *that the fish

(a) Vide *Canal Commissioners v. The People*, 5 *Wendell's Rep.* 423 *Rogers v. Jones*, 1 *Ibid.* 257. *Gould v. James*, 6 *Cowen's Rep.* 369. *Ex parte Jennings*, *Id.* 518.

in the first count, the fish in the second count, the fish in the third count, and the fish in the fourth count, mentioned, were and are the same fish, and not other or different; and the fishery mentioned in the first, second and third counts are one and the same fishery, and not other or different; and the defendant further said, that the said supposed fishery, in which, &c. at the several times when, &c., was, and still is, and from time immemorial has been, part and parcel of the said river, called *Salmon* river; and that the said part thereof, in which, &c., now is, and at the said several times when, &c. was, and from time whereof the memory of man is not to the contrary, has been, a public and common navigable river, in which the waters of the sea or lake, called lake *Ontario*, during all the time aforesaid, have flowed and reflowed; and that in the said part of the said river, called *Salmon* river, in which, &c., every citizen of the state, at the said several times, when, &c., of right had, and of right ought to have, and still hath, and of right has, the liberty and privilege of fishing: wherefore, the defendant, being a citizen of this state, entered into the said fishery, in which, &c., so being part of the said navigable river as aforesaid, where the waters of the said sea or lake flow, to fish in the said river; at, &c., when &c., being seasonable times of the year for such fishing; and did the acts complained of, &c.; with a verification, &c.

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The plaintiff *demurred* to the *second* plea, and assigned special causes of demurrer, to wit: 1. That the plea is not an answer to the breaking and entering the closes of the plaintiff, as set forth in the first and last counts; 2d. That it is attempted, by the said plea, to make that an answer to both counts, which is an answer to one count only; 3d. That it is not an answer to the breaking and entering mentioned in either of the counts in particular; and is otherwise defective, insufficient and informal. There was also a special demurrer to the *third* plea: 1st. Because that plea is not an answer to the trespasses alleged in the first, second, third and fourth counts, which were particularly referred to in the introductory part of the said plea. 2d. Because the plea attempts to make that an answer to the trespasses alleged *in all the counts, which is an answer to the trespasses set forth in one of the counts only. 3. Because the said plea does not allege that the tides of the sea, or of the lake, called lake *Ontario*, during all or any part of the time mentioned in the said plea, have flowed and reflowed in that part of the said river in which, &c. 4. That the plea is double, &c.

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The defendant joined in demurrer.

Talcot, (A. G.) in support of the demurrer. The declaration in this case charges two distinct entries on two distinct closes. The defendant cannot, therefore, allege in his plea, that they are one and the same close, and so set up a justification as to one, in answer to both trespasses. The case of *Nevins v. Keeler* (6 Johns. Rep. 63.) is in point. There the defendant's plea was held bad; and the court said, that he should have pleaded not guilty as to all but the one close, and a justification as to that. The second plea is, therefore, bad.

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Again; the third plea is liable to the same objection. One close is alleged to be a free fishery, and the other a several fishery, which are, in their nature, distinct closes. This plea is also bad on another ground. *Salmon* river is not a river in which the public have any common right of fishery. The plea alleges that it is a public and common navigable river, into which the sea, or lake, called lake *Ontario*, flows and reflows. But it is notorious that there is no regular flow of tide in lake *Ontario*; and, of course, there can be no flux or reflux of tide in any river which empties into that lake, within the meaning of the rule of the common law. *Salmon* river is not common or public, nor has it been declared to be so by any statute. Sir *Matthew Hale*, in his treatise *de jure maris*, &c. ch. 1. (1 *Harg. Law Tracts*, p. 5.) says, "Fresh rivers, of what kind soever, do, of common right, belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and, consequently, the right of fishing, *usque filum aquæ*," &c. "And if a man be owner of the land on both sides, in common presumption, he is the owner of the whole river, and hath the right of fishery, according *to the extent of his land in length." Fresh rivers are, *prima facie*, private property. In the case of the *People v. Platt*, (17 *Johns. Rep.* 195.) relative to the *salmon* fishery in the river *Saranac*, this court adopt the principles laid down by Lord *Hale*. In the case of *Adams v. Pease*, decided in the Supreme Court of Errors of *Connecticut*, (2 *Day's Connect. Rep.* 481.) it was decided, that the owners of land, adjoining the *Connecticut* river, above the flux and reflux of the tide, had an exclusive right of fishery opposite to the land owned by them, to the middle of the river, and that the public had an *easement* in the river, as a highway, for passing and re-passing, with vessels, boats, or any water-craft. In fact, a river, in its whole course, may partake of the three kinds of rights: As far as the tide flows and ebbs, it is a public river, both as to fishing and navigation. Above the flow and reflow of the tide, it is private as to the right of fishing, but public as to transportation by vessels and boats; and, higher still, or where the river is fresh, it is wholly private property.

N. Williams, contra. 1. The important question in this case is, whether *Salmon* river is a public river, open to the common use of all the citizens of the state, for the purpose of fishing? The defendant puts his right on that broad basis; although it is well known that this river has been used in common for navigation and fishing, during the last twenty-six years. Then what is necessary, by the common law, to render a river public, and subject to the public or common use? A free fishery and common fishery mean the same thing. (*Co. Litt.* 122. a. *Harg. note* 23 2 *Bl Com.* 40.)

It seems to have been rather hastily admitted, in some late *American* cases, that the flow and ebb of the tide is the only criterion by which to determine whether a river is navigable and open to the public use or not. This doctrine owes its origin to Lord *Hale*, in the treatise which has been cited. But the fair inference

from what Lord *Hale* has said, appears to be, merely, that where the tide flows and reflows, the river is, *prima facie*, navigable and common to all. He so states the rule in Lord *Fitzwalter's* case: (1 *Mod.* 105.) "A river," he says, "that flows and reflows, and is an arm *of the sea, is, *prima facie*, common to all." The soil of the river *Severn*, he observes, belongs to the lords on either side, and a special sort of fishery belongs to them likewise; but the common sort of fishery is common to all. And "there is no such contradiction betwixt the soil being in one, and yet the river being common to all fishers," &c. The true test of a river being public and open to all, is its being *navigable*. Fresh rivers, according to Lord *Hale*, are not navigable. In *Warren v. Matthews*, (6. *Mod.* 73. S. C. 1 *Salk.* 357.) Lord *Holt* lays down the rule, according to this distinction. He says, "The subject has a right to fish in all navigable rivers, as he has in the sea." And in *Carter v. Murcat*, (4 *Burr.* 2162.) Lord *Mansfield*, in 1768, adopts the same distinction. "In rivers not navigable," he says, "the proprietors of the land have the right of fishery on their respective sides, and it generally extends *ad filum medium aquæ*. But in *navigable* rivers, the proprietors on each have it not; the fishery is common: it is, *prima facie*, in the king, and is public. If any claim it exclusively, he must show a right, by prescription or otherwise." The same judge, afterwards, in 1774, keeping in mind this same distinction, repeats the same doctrine. "How does it appear," says he, "that this is a navigable river? The flowing and reflowing of the tide does not make it so; for there are many places into which the tide flows, that are not navigable rivers." He clearly considers it as a question of *fact*, whether a river is navigable or not. *Ex facto oritur jus*. (*The Mayor of Lynn v. Turner*, Cowp. 87.) In *Ward v. Cartwell*, Chief Justice *Willes* adopts the same doctrine. (*Willes' Rep.* 265. 268.) He observes, that this is not merely the law of *England*, but the law of nations; and he cites *Grotius*, B. et P. lib. 2. c. 3. s. 9. *Bract.* b. 1. c. 12. s. 6. (a)

*No doubt, the flowing of the tide, according to the common law, makes a river, *prima facie*, navigable. But when a river is, in fact, used by the public as a navigable river, no *prima facie* evidence is wanted as to its being public. Every one has a right to navigate it, and to fish in it. (*Miles v. Rose*, 5 *Taunt.* 705.)

Whether *salmon* or any other kind of fish frequent a river, can have no influence in the consideration of this question; (17 *Johns. Rep.* 211.) which is merely, whether the river is navigable, and subject to a public servitude or easement. On the doctrine that the flow and ebb of the tide is what renders a river navigable or public, what is to become of the great inland seas or lakes of *Europe* and *Asia*, as well as of the still greater lakes and rivers of this country? In the *Mediterranean*, there is no perceptible tide. "There shrinks no ebb in that tideless sea." The common law of *England*,

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(a) "Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicari, funes arboribus ibi natis religari, onus aliquod in iis ponere, cujus liberum est sicuti in ipsum fluvium navigari: sed proprietas earum est illorum quorum prædiis adherent; et eadem de causa, arbores in eisdem natæ eorundem sunt: et hæc intelligenda sunt, de fluminibus perennibus; quia temporalia possunt esse privata."

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on this subject, was never intended to be applied to the large rivers of this country ; nor has it, in fact, been adopted ; but, on the contrary, our rivers have always been free to all our citizens, for fishing as well as for navigation. In *Carson v. Blazer*, (2 *Binney's Rep.* 475.) Chief Justice *Tilghman* so considers it ; and says, that the rule of the *English* common law has never been applied to the fresh water rivers in *Pennsylvania*. *Yeates, J.*, observed, that "the qualities of *fresh* or *salt*, or the flux and reflux of the tide, cannot decide whether a river is navigable or not." If rivers in which the tide does not flow, are private property, then the islands in those rivers must belong to the owners of each shore, a doctrine which has never been asserted in this country, as to any of our navigable rivers. That *Salmon* river is a navigable river, and that the water of lake *Ontario* flows into it, are facts admitted by the demurrer ; and if the river is private property, so also must be the lake, on the same principle. What, then, is the rule of law in this state ? It is, that any river which is subservient to public use, is common to all, for the purposes of fishing, as well as navigation ; though a private individual may be the owner of the soil. If *Salmon* river is susceptible of such use, as a common passage for the public, then, according to established law and usage, the *fishing* in it is common. In the case *of the *Saranac*, Mr. *J. Platt* said that it was conceded, that the river was not navigable for boats of any kind ; and that the defendant had enjoyed the sole right to the river for more than thirty years. That "the power of regulating and controlling the use of the *Saranac*, to subserve the public interest, would have been impliedly reserved, had the river been navigable." (S. P. 10 *Johns. Rep.* 236. 238.) In *Palmer v. Mulligan*, (3 *Caines's Rep.* 307.) all the judges considered the *Hudson* river, above tide water, where it was navigable, as common to all ; as a highway. Though the chief justice seemed to recognize the *English* doctrine, as to the ebbing and flowing of tides, he admitted that fresh rivers of every kind may be under the servitude of the public, and be regarded as common highways, by water. That *Salmon* river has been so considered, is evident from the statutes regulating the fishery in it. (2 *N. R. L.* 544. sess. 35. ch. 131. sess. 37. ch. 213.)

If, then, this river is a highway, any person may take fish in it, for fish are *feræ naturæ*, and become the property of the first taker. (2 *Bl. Com.* 392. 403. *Cooper's Justinian*, b. 2. tit. 1. s. 12.) Trespass will not lie for taking fish in a free fishery ; for the plaintiff can have no fish until he takes them. (3 *Mod.* 97.)

2. As to the pleadings : The *first* plea of not guilty is an answer to the charge of breaking and entering the closes, and to all that depends on force : The *second* plea justifies as to the first and last counts, by stating that both the closes were *public highways*, &c. (2 *Chitty's Pl.* 570, 571.) It was not necessary to state how they became so. (3 *Term Rep.* 265. 8 *Term Rep.* 608.) The *third* plea justifies as to all the other counts, enumerating the trespasses, &c., by stating that the *locus in quo*, which is the same in all the counts, is, and has been, a *navigable* river, &c. (1 *Chitty's Pl.* 506, 507. 533. 2 *Chitty's Pl.* 556, 557. 562.)

Talcot, (A. G.) in reply. The third count is for entering a free fishery; and a free and common fishery are the same. There is a precedent in 2 *Chitty's Pl.* for such a count.

The question here, is not whether the public have a right of fishing in a navigable river, but what is a navigable river, *in the common law sense of the term; and we contend, that in the common law acceptation of that term, no river is navigable where the tide does not flow and reflow. In *Palmer v. Mulligan*, (3 *Caines*, 315.) Chief Justice *Thompson* adopts the rule of the common law of *England*, as laid down in the treatise of Sir *Matthew Hale*; and *Kent*, J., refers to that treatise with the highest approbation, and considers that the true and just rule on the subject is there laid down; and so do all the judges in the case of *Adams v. Pease*, in regard to the *Connecticut* river.

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SPENCER, Ch. J., delivered the opinion of the court.

The case of *Nevins v. Keeler* (6 *Johns. Rep.* 64.) is decisive, that the second and third pleas are informal. They profess to answer the whole declaration. The defendant should have justified as to one *locus in quo*, and pleaded not guilty to all but one close. He had no right to narrow the plaintiff's declaration in the manner attempted; and the plaintiff could not take issue on the allegation that the several closes were one and the same, and that the fisheries were one and the same. But the real question in the cause is, whether the defendant has set forth, in the third plea, sufficient matter to bar the plaintiff's right of action. He alleges that the *locus in quo* is part and parcel of *Salmon* river, and that the part thereof in which, &c., is, and always has been, a public and common navigable river, in which the waters of lake *Ontario* have flowed and reflowed, and that every citizen of the state has the right of fishing therein; and, therefore, &c., justifying the fishing complained of by the plaintiff.

We cannot consider this plea as setting up, that the waters of *Salmon* river are not fresh water; or that the flowing of the waters of lake *Ontario* into it, and the reflowing thereof, are the flux and reflux of the tides, or any thing else than occasional and rare instances of a swell in the lake, and a setting up of the waters into the river, and the subsiding of such swells; nor can we understand the allegation, that it is a public and common navigable river, in any other sense, than that it is used with boats and small craft. I will not say, that we can judicially notice the real state of the facts, but they are indisputably so; and as the plaintiff must have *judgment on this demurrer, for the formal defects of the pleas, it would probably be desirable to both parties, that the court should pronounce an opinion on the facts as they are, and as they would prove to be, on a trial. I shall, then, assume, that *Salmon* river is a fresh water river, that there is no regular flux and efflux of the tide in it, that it is navigable only for boats and small craft, and that it has all been granted by the state to private individuals. In the case of *The People v. Platt* and others, (17 *Johns. Rep.* 195.) we were not called upon to decide this precise question, because the river *Saranac* was not navigable

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for boats of any description, although salmon ascended into it, beyond the obstruction occasioned by *Platt's* dam; but we recognized the principles of the common law to be, that, in the case of a private river, that is, where it is a fresh water river, in which the tide does not ebb and flow, and is not, therefore, an arm of the sea, he who owns the soil has, *prima facie*, the right of fishing; and if the soil on both sides be owned by an individual, he has the sole and exclusive right; but if there be different proprietors on each side, they own, on their respective sides, *ad filum medium aquæ*. We considered, in the case referred to, that it was not inconsistent with this right, that the river was liable and subject to the public servitude, for the passage of boats; the private rights of the owners of the adjacent soil were no otherwise affected, than by the river's being subject to public use. The same doctrine was advanced by *Kent*, Justice, in *Palmer v. Mulligan*, (3 *Caines's Rep.* 319.) without any dissent by the other judges. The case of *Adams v. Pease* and another (2 *Connecticut Rep.* 481.) has been published since the decision of the case of *The People v. Platt*, and there is an entire coincidence of opinion. All the judges there held, that the owners of land adjoining *Connecticut* river, above the flowing and ebbing of the tide, have an exclusive right of fishing opposite to their land, to the middle of the river; and the public have an *easement* in the river, as a highway, for passing and repassing with every kind of water craft. The decision of that case was placed on the same adjudged cases as were relied upon in the case of *The People v. Platt*.

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*The defendant's counsel supposes, that the common law of *England*, which he seems to admit, if applied to this case, would be decisive against his client, is inapplicable here, as our navigable rivers are formed on a much larger scale than those in *England*; and that where the judges of their courts, or their elementary writers, have said that the right of fishing was a common and a public right in navigable rivers, in which the tide ebbs and flows, they have adopted the ebbing and flowing of the tide as evidence of the navigability only of the river; and that, therefore, where the fact of navigability is proved, and does exist, in any given case, the river is, and must be, public. This I conceive to be a mistaken idea. The common law of *England* considers a river, in which the tide ebbs and flows, an *arm of the sea*, and as navigable, and devoted to the public use, for all purposes, as well for navigation as for fishing. It also considers other rivers, in which the tide does not ebb and flow, as navigable, but not so far belonging to the public as to divest the owners of the adjacent banks of their exclusive rights to the fisheries therein. The case of *Carson v. Blazen* (2 *Binney's Rep.* 475.) has been much relied on to sustain the doctrine contended for by the defendant's counsel. In that case, only two of the judges gave opinions as to the common law right of the proprietor of the bank or margin of the *Susquehannah*, to the exclusive enjoyment of the fishery opposite to his shore; and it will be seen that they admit the common law of *England* to be in favor of the right claimed; but they sup

posed that the people of *Pennsylvania* had not adopted that part of the *English* common law, as it was not deemed proper in that country. They placed great stress, too, on several acts of the assembly, declaring that river to be a highway, and regulating the fisheries, which they held to be incompatible with the common law right. They rejected, as inapplicable to them, the common law principle, that the flux and reflux of the tide ascertained the character of the river. Now, I do not feel myself authorized to reject the principles of the *English* common law, by saying they are not suited to our condition, when I can find no trace of any judicial decision to that effect, nor any legislative declaration or provision *leading to such a conclusion. Indeed, I concur in the opinion expressed by the late and present chief justice of *Connecticut*, in the case cited, that a more perfect system of regulations on this subject could not be devised: it secures common rights, as far as the public interest requires, and furnishes a proper line of demarkation between them and private rights; that is, by considering rivers navigable as far as the sea flows and reflows, and the right of fishing as common to all; and rivers not, in that sense, navigable above the flow and reflow of the sea, in which the adjoining proprietors have the exclusive right; and I concur in the doctrine, that all rivers, in fact, navigable, whether above the flow of the tide, or whether in its whole extent unaffected by the tides, in reference to the use of them, as public, and subservient to public accommodation, and liable to governmental regulation. I agree, also, with Chief Justice *Hosmer*, in the position, that the doctrine of the common law promotes the grand ends of civil society, by pursuing that wise and orderly maxim, of assigning to every thing capable of ownership, a legal and determinate owner. Lord *Mansfield's* opinion, in *Carter* and another v. *Murcott* and another, (4 *Burr.* 2162.) has been misconceived; the defendant's counsel supposed it to be favorable to the pretensions set up by the defendant, but it is directly otherwise. He says, "In navigable rivers, the proprietors of the land on each side have it not; the fishery is common; it is, *prima facie*, in the king, and is public." The case under consideration was that of a navigable river, which was an arm of the sea; and his lordship spoke of navigable rivers in the common law sense of the term, or of such as were arms of the sea.

The defendant's counsel laid some stress on the acts of the legislature, (2 *R. L.* 544. and the act, sess. 37. ch. 214.) regulating fishing, and the taking of salmon, in *Salmon* river. These acts prove nothing; for the legislature have, confessedly, the right of regulating the taking of fish in private rivers; and do, every year, pass laws for that purpose, as to rivers not navigable in any sense, and which are, unquestionably, private property.

*There must be judgment for the plaintiff, with leave to the defendant to plead *de novo*, on payment of costs.

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Judgment accordingly.

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SCOFIELD and TAYLOR *against* DAY and GELSTON.

Where a promissory note was drawn at *Montreal*, in the *British* province of *Lower Canada*, payable to parties residing in *England*, "with interest, until paid in *England*;" *Held*, that the plaintiffs, on a judgment obtained in this court, against the makers, are entitled to interest only up to the time of the judgment; and that according to the legal rate of interest in *England*. They are not entitled to any allowance for the current rate of exchange on *England*, at the time of the judgment, in addition to the *English* interest; nor to any other allowance on account of the difference of exchange.

THIS was an action of *assumpsit* on a promissory note, made by the defendants, at *Montreal*, in *Lower Canada*, payable to the plaintiffs, (who resided in *England*,) or to their order, "with interest until paid in *England*."

The questions raised for the consideration of the court were, 1. Whether the plaintiffs were entitled to *interest*, according to the legal rate of interest in *Lower Canada*, which is six per cent., or according to the legal rate of interest in *England*, which is five per cent.

2. Whether the plaintiffs were entitled to interest up to the time when, in the ordinary course of business, the money could be remitted and paid to them in *England*, or only up to the time of judgment.

3. Whether the plaintiffs were entitled to be allowed the *current rate of exchange* on *England*, at the time of the judgment, in addition to the interest.

Hubbell, for the plaintiffs.

Penfield, for the defendants.

Per Curiam. The plaintiffs are entitled to *English* interest, and not to the rate of interest in *Lower Canada*. And the interest is to be calculated up to the time of the judgment, not to the time when the money might, in the ordinary course of business, be remitted to *England*. The plaintiffs are not entitled to any allowance on account of the difference of exchange with *England*.

Judgment accordingly.

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*BRADSHAW *against* RODGERS and MAGEE.

ON *certiorari* to a justice's court.

The third section of the act, passed April 15, 1817, (sess. 40. ch. 262.)

relative to *canals*, does not authorize the commissioners, or their agents, to enter upon and occupy lands, unless it be necessary to prosecute the *canal* improvements. And the 21st section of the act for the maintenance and protection of the *canals*, &c., passed April, 13th, 1820, (sess. 43. ch. 202.) authorizing the commissioners to discontinue or alter any part of a *public road*, or *highway*, which may interfere with the location or construction of the *canals*, does not apply or extend to a *turnpike road*, which is the *private* property of a *turnpike corporation*.

An entry, therefore, on the land of a person, by the agents of the commissioners, for the purpose of making a new road, in the place of a part of a *turnpike road* discontinued by them, and taken for the purposes of the *canal*, is a trespass, for which the party injured is entitled to recover damages.

To take private property for public use, without making a just compensation to the party, is not only unconstitutional, as against a fundamental principle of government, but a violation of natural right and justice; an act of the legislature, therefore, violating this principle, is null and void. (a)

(a) Vid. *Vanderbilt v. Adams*, 7 Cow. Rep. 849. *Crittenden v. Wilson*, 5 Id. 165. *Rodgers v. Bradshaw*, post, 735. *Clark v. Phelps*, 4 Cow. Rep. 190.

Ford and Whitehall Turnpike, between the seventh and eighth mile-stones, by the defendants' entering thereon, and cutting, &c. young and thrifty timber; and demanded damages to 50 dollars.

The defendants admitted the trespass, but denied the amount of damages, and the plaintiff's right to recover; and pleaded a justification under the several acts relative to *canals*, and the acts passed in addition thereto. The cutting of the timber by the defendants, and the value thereof, were proved.

The defendants relied on the acts of the 17th of *April*, 1816, (sess. 39. ch. 237.) and the 15th of *April*, 1817, (sess. 40. ch. 262.) and the subsequent acts relative to canals. It was proved by the defendants, that they had entered into a contract with *Samuel Young*, one of the canal commissioners, to make a turnpike road, in lieu of part of the turnpike road which had been taken for the canal; that the same had been approved by the chief engineer; and that the cutting the timber complained of, was necessary to complete the said road. The objections to the defence were, 1. That compensation ought to have been made to the plaintiff before his land was entered upon and taken. 2. That the engineer had no authority to alter the route of the turnpike, and, consequently, had no authority to take the plaintiff's land; and, 3. That no certificate of the contemplated *alteration had been made or filed. The justice gave judgment for the defendants. The case was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court.

The same objections which were urged against the defence set up in the court below, have been made here, as grounds for the reversal of the judgment. The third section of the act of the 40th session, ch. 262, does not apply to this case, because the plaintiff's land has not been entered upon for the prosecution of the canal improvements intended by that section. For such objects, it does not admit of a doubt that the canal commissioners, and their agents, have a right to enter upon and occupy lands necessary to effectuate the objects of their appointment, without having first paid the loss and damage which the proprietor of the lands may sustain. It is true, that the fee simple of the land is not vested in the people of the state, until the damages are appraised and paid; but the authority to enter is absolute, and does not depend on the appraisal and payment; and that act provides fully for the payment of the loss and damage sustained by any person whose lands are taken for the purposes of the canal. This case turns upon the construction of the 21st section of the act of the 13th of *April*, 1820, (sess. 43. ch. 202.) which provides, that, in all cases in which it shall be deemed necessary by the principal engineer, in laying out the line of the *Erie* or *Champlain* canals, to discontinue or alter *any part of a public road or highway*, on account of its interfering with a proper location or construction of either of the canals, such engineer shall be authorized to make such discontinuance or alteration; and upon his drawing up, in writing and figures, a true description of all such parts of any public road or highway as he may discontinue and new lay, on the account

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aforesaid, and filing the same in the clerk's office of the town in which such discontinuance and alteration may be situated, the same shall be lawful. The proviso requires the commissioners to open and work the newly laid road before the former is discontinued. With every disposition to uphold and justify the commissioners, and their agents, in the great and valuable *work in which they are engaged, consistent with law, I must say, and I say it with regret, I think the proceedings in this case indefensible. It has been already observed, that the plaintiff's land was not entered upon for any purpose immediately connected with the canal; but was taken as a substitute for part of a turnpike road, which was broken up and taken for the canal; and without some legislative authority, independently of the act of the 40th session, ch. 262. the trespass now complained of could not be justified. This must have been the sense of the legislature, and probably of the canal commissioners, in the enactment of the act of the 43d session, ch. 202. sec. 21. The first objection is, that the act last referred to applies only to a public road or highway, and that the turnpike road is not a public road or highway, but the property of the turnpike corporation. It is, undoubtedly, true, that there is a material and manifest distinction between a public road and highway, and a turnpike road. The former is open and public for the passage of every person, without any toll, or other imposition; whereas the latter is private property, subject to be travelled over, on first paying an equivalent for its use, prescribed by the legislature. It is impossible to extend the provision relative to a public road and highway, to embrace a turnpike road, without doing violence to the expressed and declared intention of the legislature. The act, in requiring the principal engineer to draw up and file a description of the parts of the road discontinued and laid anew, in the clerk's office of the town in which such discontinuance and alteration may be situated, evidently shows that the legislature meant, as the act purports, to authorize such discontinuance and alteration as to public roads and highways only; for they have adopted the provisions of the existing laws, as to laying out and altering public roads and highways, by the commissioners of roads, of the several towns, and which provisions are wholly inapplicable to turnpike roads. The present, then, is a *casus omissus*.

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If we could surmount this difficulty, a more serious one presents itself. The act under consideration contains no provision to compensate, at any time, those whose lands *may be taken as a substitute for a public road or highway, altered or discontinued by the principal engineer, for the damages they sustain. This is directly opposed to the fifth article of the amendments of the constitution of the *United States*, which forbids the taking of private property for public use, without just compensation. The same inhibition to the power of the legislature, is contained in the late amendments to the constitution of this state. I do not rely on either, as having a binding constitutional force upon the act under consideration. The former related to the powers of the national government, and was intended as a restraint on that government; and the latter is not yet operative. But they are both declaratory

of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice. This all important and essential principle was somewhat illustrated in the case of *The People v. Platt*, (17 Johns. Rep. 215.)

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We are bound, on both points, to declare that the judgment below is erroneous.

Judgment reversed.

The Executors of MORTON against The Terre-tenants of CROGHAN.

SCIRE FACIAS to revive a judgment recovered in October, 1770, in the Supreme Court of the then province of New-York, in favor of *John Morton* against *George Croghan*, for 10,500 pounds of debt, and 8l. 4s. 3d. damages and *costs. In the year 1804, and after the death of both the parties, the plaintiffs, as executors of *Morton*, revived the judgment against the heirs of *Croghan*; and one thousand dollars were made on an execution issued after such revival, which execution, as to the residue, was returned *nulla bona*. The judgment was, also, revived for the residue, by the plaintiffs against the heirs, in 1809; and again, in 1813. The present action was commenced in December, 1817, by *scire facias*, to the sheriff of New-York, against the heirs and terre-tenants of *Croghan*, which writ was returned *nihil*. A *testatum scire facias* was then issued to Otsego county, to which the sheriff returned, that he had summoned *G. W. Prevost*, and three others, the heirs, and *Samuel Cooper*, and fourteen others, (of whom *Abraham Hartwell* was one,) the terre tenants of said *George Croghan*, to be, &c., which were all the heirs and tenants of said *George Croghan* in his bailiwick. The heirs and terre-tenants appeared by their respective attorneys. Upon the application of the terre-tenants, the plaintiffs were required, by rule of court, to file security for costs. To the declaration, which was in the usual form, the heirs pleaded *riens per descent*, and the terre-tenants (except *Hartwell*, who, in the mean time, had died) pleaded that *Seth Cook*, and others, (five hundred and forty-five in number,) whose names, places of residence, and lands, were specified at length in the plea, were tenants of certain lands in the county of Otsego, whereof *George Croghan* was seised at the rendition of the judgment, and were not named in the writ of *testatum scire facias*, nor returned as tenants; wherefore they prayed judgment, if they should answer the said writ, &c. This plea was verified by affidavit. In consequence of this plea, the plaintiffs issued a writ of *scire facias* to the sheriff of the county of Otsego, reciting the former writs, and setting forth the sheriff's return; the appearance of the heirs and terre-tenants; the declara-

Where a judgment creditor proceeds to enforce his lien on

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real estate, and it becomes necessary, for that purpose, to revive the judgment, he must make all the terre-tenants, or persons having a fee in the land, parties to the *scire facias*, in order that they may be compelled to contribute jointly to the payment and satisfaction of the judgment.

If, in such case, some of the terre-tenants appear and plead, and others make default, and the plaintiff enters a *nolle prosequi*, as to those who appeared and pleaded, and takes judgment by default against the others, it is a *discontinuance* as to all the defendants; and he must pay costs, as in a case of discontinuance. But it is otherwise in actions of tort, where the plaintiff has his elec-

tion, to sue jointly or severally; or in *assumpsit*, or *debt*, where one of the defendants pleads matter of personal discharge, which does not go to the action of the writ, as *bankruptcy* or *infancy*. (a)

(a) Vide *Judson v. Gibbons*, 5 Wendell's Rep. 224. *Le Page v. M'Crea*, 1 Ibid. 164. *Hall v. Rochester*, 3 Cow. Rep. 374. *Cumming v. Eden*, 1 Cow. Rep. 72. note b. *Ex parte E. Nelson*, Id 417.

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tion the death of *Hartwell*; and that the tenants had pleaded that *three hundred and thirty-three* persons, (naming them,) and also divers others, by them specified, were tenants, &c., and were not named, nor returned, and commanding the sheriff to summon those *three hundred and thirty-three* persons, (and of whom *Seth Cook* was one,) to be, &c., and to *show why execution should not be made of the lands whereof they were tenants.

The sheriff of *Otsego* returned, to the last writ, that he had summoned *three hundred and eleven* of those named, and as to the remaining twenty, *nihil*. Of those summoned, *two hundred and seventy six* appeared; the others, *thirty-five* in number, (of whom *William James* was one,) not appearing, their defaults were entered. Against the twenty returned *nihil* in the last writ, an *alias scire facias*, reciting the last writ, and the sheriff's return, was issued, to *Otsego* county, which was also returned *nihil*; this being deemed equivalent to a *scire feci*, defaults were regularly entered against them for not appearing.

The terre-tenants last summoned being served with a declaration, *two hundred and thirty-five* pleaded, that there were *thirty-six* other persons of the county of *Otsego*, naming them, who were terre-tenants of lands held by *George Croghan*, at the rendition of the judgment, and who were not named, &c., and praying judgment, &c., (as in the former plea.) *Rufus Hawkins* pleaded in abatement, that *Seth Cook*, one of the tenants impleaded in the first dilatory plea, and named in the second writ of *scire facias*, issued to the county of *Otsego*, was *dead*, and that he died before the issuing of that writ, viz. in *March, 1819*.

Robert Carr pleaded, that *Abraham Hartwell*, one of the terre-tenants first summoned, was *dead*; that he died after the issuing and return of that writ, viz. on the *10th February, 1818*, leaving *Luther Hartwell*, his son, and heir at law, to whom the houses and lands, whereof *Hartwell* was tenant, descended; that the said *Luther Hartwell* was not named in the proceedings, and praying judgment, and that the writ may be quashed.

Ephraim Carr pleaded, that *Samuel Cooper*, one of the terre-tenants first summoned, was *dead*; that he died after the pleading of the plea, by the said *Samuel Cooper* and others, (first dilatory plea,) to wit, of the *15th February, 1819*, and praying judgment, and that the writ may be quashed.

To the three last-mentioned pleas in abatement, the plaintiffs demurred, and the defendants joined in demurrers. *Thirty-seven* others pleaded *non-tenure*, which plea was replied *to by the plaintiffs, and issue joined. In the mean time, *one hundred and sixty-nine* persons, of those impleaded in the first dilatory plea, appeared voluntarily by their attorney, and pleaded *non-tenure*, to which the plaintiffs replied, and issue was joined.

Against the remaining *forty-five*, impleaded by the first dilatory plea, another writ of *scire facias* was issued to *Otsego* county, which was returned *nihil*, and, an *alias scire facias* being returned against them, in like manner, their defaults, for not appearing, were entered. The *five hundred and forty-five*, first impleaded, being thus disposed of, the plaintiffs filed an affidavit of that fact,

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and entered, in *October*, 1820, a rule, requiring the surviving tenants, first summoned, to answer further in twenty days; a notice of which rule was served on their attorney, on the 12th *October*, 1820. The tenants first summoned then applied to the court for an order, that the rule to answer further be set aside, and that the several writs of *scire facias*, and all proceedings thereon, be set aside, with costs; which motion was founded upon an affidavit, stating, that *Abraham Hartwell* and *Samuel Cooper*, returned as tenants, were dead. That *Seth Cook*, one of the terre-tenants, named in the second *scire facias*, issued to the county of *Otsego*, was dead, and that he died before the issuing of that writ. That *Abraham Marvin* and *Gaius Smith*, two other of the terre-tenants named in the last-mentioned writ of *scire facias*, had died since the return thereof, and that pleas in abatement, grounded on the deaths of those persons, were pending.

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This motion was argued in *January* term, 1821, by *R. Campbell* and *J. V. Henry*, for the terre-tenants, and *B. F. Butler*, (*Burr*, *E. Williams*, and *Van Buren*, same side,) for the plaintiffs. The court held the matter under advisement until the next *May* term, but in the mean time, the plaintiffs, on the 9th day of *April*, 1821, and before the expiration of the limitation in the act, entitled "An act concerning judgments and executions," docketed a judgment against 109 persons, whose defaults for not appearing had been previously entered, viz. 36 upon a return of *scire feci*, and 73 upon two returns of *nihil*, entering upon the record a *nolle prosequi*, as to the heirs, and all the terre-tenants *who had appeared. In consequence of this proceeding, the motion argued at *January* term, 1821, was not determined by the court. The defendants, against whom judgment had been entered, now moved, upon the grounds stated in the argument, that the judgment be set aside; the surviving terre-tenants, first summoned, also moved that the bond filed as security for costs, should be delivered up, to be prosecuted by them; and the terre-tenants, who had appeared and pleaded the second dilatory plea, also moved for costs against the plaintiffs.

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R. Campbell, for the defendants. 1. The writs of *scire facias* have all been issued without first obtaining the leave of the court for that purpose, though the judgment was of more than twenty years' standing. (*Lansing v. Lyons*, 9 *Johns. Rep.* 84. *Bank of New-York v. Eden*, 17 *Johns. Rep.* 105.) These defendants being now before the court, for the first time, are entitled to make this objection, and to move to have the writs quashed.

2. No proceedings have been had against the personal representatives of *Croghan*, previous to issuing the *scire facias* against the heirs and terre-tenants. The judgment, therefore, against the terre-tenants is irregular. (*Tidd's Pr.* 1032. *Fitz. N. B.* 595. *Bac. Ab. tit. Scire Facias*, C. 5. *Carth.* 107. 2 *Saund.* 72. o. 72. p. notes. *Whitney v. Terre-tenants of Crosby*, 3 *Johns. Rep.* 86.) It may, perhaps, be objected, that this should be taken advantage of by plea, and not by motion; but we have found no precedent for such a plea. The statute relative to judgments and executions, directs the execution to be first issued against the

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goods and chattels of the debtor. (1 *N. R. L.* 502, 503. sess 36. ch. 5. s. 9.) (a)

3. But, admitting that the proceedings were regularly commenced, the writs have abated by the deaths of various terre-tenants. The statute (1 *N. R. L.* 519. sess. 36. ch. 56. s. 9.) (b) does not apply to such a case, and the plaintiffs have no right to suggest these deaths on the roll. Where all proper parties are before the court, and one dies, there is no good reason why the suit should abate when the cause of action survives; but where the heirs of the deceased must *be made parties, there a new suit is necessary. The rule of the common law is, that the death of one terre-tenant abates the whole proceedings, unless where the survivors have the whole interest, by survivorship; for every tenant to the land is entitled to have contribution from the other tenants of the land; and, therefore, unless *all* the tenants are warned, the others are not obliged to answer: and if the defendant does not take advantage of the omission by a plea, he will be concluded, and cannot call on the others for contribution, and execution will go against his land alone. (2 *Saund.* 9. note 10.) The second *scire facias* names parties who are liable to contribute, and have not been brought before the court. It recites the death of *Abraham Hartwell*, one of the tenants. If the plaintiff names the terre-tenants, and omits one, the suit is abated; for he can have a better writ. (6 *Bac. Ab.* tit. *Scire Facias*, C. 5.) Again; if the writ is general, and the sheriff returns that he has summoned *A. B.* and *C.*, it is bad, for he ought to return *all* the tenants. Again; *Seth Cook*, named in the writ as one of the tenants, was dead when the writ issued. His death must abate the writ *in toto*; for it is false on the face of it. (*Com. Dig.* tit. *Abatement*, E. 17. *Vin. Ab.* tit. *Abatement*, A. pl. 22. 2 *Saund.* 72. i. *Bac. Ab.* tit. *Abatement*, L.)

4. As to those tenants against whom judgment has been entered upon the return of *two nihil*s, the judgment is wholly irregular. The return of a *nihil* to a *scire facias* against terre-tenants, is a perfect nullity, and will not authorize any proceedings against them. It is absurd to charge a person as a *terre-tenant*, when the sheriff returns that he has no land, nor any thing by which he can be warned. (*Vin. Ab.* tit. *Scire Facias*, I. 1 *Brod. & Bingham's Rep.* 381. 2 *Wm. Bl.* 995. 1141.) Again; a year elapsed after the plea, and before a second writ issued; and between the time of the plea and the issuing of the writ, *B. P.*, one of the tenants, aliened his land, and removed. Now, can a *nihil*, returned by the sheriff to this writ, bind the purchaser from *B. P.*, or the new tenant?

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5. The plaintiffs have entered a *nolle prosequi* as against above four hundred of the tenants, who had been brought *before the court, and have entered a judgment against the others, thus throwing the burden of the whole debt upon them. This *nolle prosequi*, we contend, operated in the nature of a *retraxit*, and discharged all the defendants, so that no judgment could be entered against any of them. The exceptions to the general rule

(a) 2 *Rev. Stat.* 363.

(b) 2 *Rev. Stat.* 365.

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are, when the discharge is merely personal, as in the case of *bankrupts, infants* or *executors*. There would be manifest injustice and hardship in making these few tenants pay the whole debt, without having any right to call on the heirs, or other tenants, for contribution. Serjeant *Williams*, in his note to *Salmon v. Smith*, (2 *Saund.* 207 a. n. 2.) has collected all the cases on this subject. (1 *Wils.* 89. *Cro. Eliz.* 762. *Tidd's Pr.* 632. *Robertson v. Smith*, 18 *Johns. Rep.* 459.) There is, too, a *nolle prosequi* as to the heirs of some who were liable in the first instance.

6. At all events, the defaults ought to be set aside, as the defendants have sworn to merits; and most of those who were summoned give sufficient excuses for not appearing; and two of the defendants, *William James* and *Isaac Lewis*, deny all notice. As to those against whom *nihiis* have been returned, and who were not summoned, they are entitled to be let in to defend, as a matter of course.

As to the question of *costs*, he contended, that the plaintiffs had subjected themselves to pay costs to all the defendants discharged by the entry of the *nolle prosequi*. The *nolle prosequi* was the same as a *discontinuance*; and so within the statute relative to *costs*. (3 *Term Rep.* 511. 17 *Johns. Rep.* 263. 3 *Bos. & Pull.* 115.)

Butler, and *Talcot*, (A. G.) contra. 1. As to the first objection; it should have been made by the persons first summoned, in *January*, 1818; persons brought in subsequently cannot make it. Where a judgment has been once revived, within *ten* years, though obtained long before, the plaintiff may have a *second scire facias*, without motion, or leave of the court; and that, too, against different persons. (*Hardisty v. Barney*, 2 *Salk.* 598. 2 *Sellon's Pr.* 116. 2 *Saund.* 12. g. note 7.) There have been revivals of this judgment against the *heirs*, in 1806, 1807 and 1809. This is evidence, *prima facie*, that the debt remains unpaid; and affidavits of the fact were filed soon after the commencement of the suit, in reference to the application for security for costs. The writs against the present defendants were issued in consequence of the plea put in by the sixteen tenants first summoned, that there were other tenants who ought to be summoned, so that the plaintiffs were compelled to proceed, by the express award of the court, or be *non-prossed*.

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2. It no where appears that *C.* had any *personal* representatives. And if it did, the objection cannot be made, at this time, and by these defendants. The judgment has been several times revived against his *heirs*, and part of the debt has been made of the lands in their hands; yet no such objection was raised. It must be presumed that there were no personal representatives, or that they had *no assets*. At any rate, the defendants are in default, which precludes them from making the objection. (*Whitney v. Camp*, 3 *Johns. Rep.* 222.)

3. That the proceedings have abated by the death of any of the tenants, is a matter which cannot be determined on motion. The law has prescribed an appropriate plea for such a case; and what

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a party can plead, he cannot bring up on motion. (*James v. Penrise, Loft's Rep.* 65.) *Hartwell*, and the other two tenants whose deaths are relied on, (except *Cook*,) died after appearance, and their deaths abated the proceedings as to them only. That was the case on *scire facias*, even at common law. (*Vin. Ab. tit. Abatement*, M. a. pl. 16. *Com. Dig. tit. Abatement*, H. 35. 42 *Assiss.* 262. case 22. 10 *Co.* 134. *Cro. Car.* 518.) Besides, our statute, (1 *N. R. L.* 519.) in spirit at least, if not in express terms, applies to this case, as well as to any other; and the deaths have been properly suggested on the roll. If the death of one tenant, pending the suit, abates it as to all, it will be utterly impossible to revive a judgment against numerous tenants. The deaths of these persons appear on the record, and the defendants may bring their writ of error. As to *Cook*, the sheriff has returned *nihil*; and the allegation of his death contradicts the return, which is not allowed on a *scire facias*. But we contend, that his death abated the suit as against himself only. It is true, the rule *is laid down in some of the *digests*, and elementary books, as stated by the defendant's counsel; but its accuracy may well be doubted; and, if correct, it does not apply to a *scire facias*. A *misnomer* of one defendant renders the writ equally false; yet, in that case, the writ is good against those rightly named. (*Blackman's case*, 8 *Co.* 179 b. 1 *Chitty's Pl.* 441.) The cases cited in the *digests* and *abridgments*, in support of the rule, are very ancient; and such a mistake will hardly be deemed fatal at the present day. But in many of the old cases, it has been held, that the death of one defendant before writ purchased, abates the writ as to him only. (*Pollard v. Jekyll, Plowd.* 89. *Vin. Ab. tit. Abatement*, Q. a. S. a. T. a.) Whatever may have been the practice in other cases, the rule has not been applied to *scire facias*, which being a *judicial*, not an *original* writ, the rule is not so rigorous as in other cases. (*Read and Redman's case*, 10 *Co.* 134.) The objection has, indeed, been taken, in several instances; but the writ has been held good as to the tenants surviving. (*Vin. Ab. tit. Abatement*, S. a. p. 65—68. *Bac. Ab. tit. Execution*, G. 4 *Hen. VI.* 3. 19 *Hen. VI.* 9. 41 *Edw. III.* 13. 3 *Hen. VII.* 1. 6. case 2. 38 *Edw. III.* 20. *Cro. Car.* 518.) The mode of proceeding, in modern times, by *scire facias* against terre-tenants, is, not to name them; and the persons returned by the sheriff can plead in abatement, that there are others who ought to be summoned; but this plea merely suspends the proceedings until the others are brought into court. (*Jefferson v. Morton*, 2 *Saund.* 6. 9. notes.)

Again; a *scire facias* may be amended, when it is not brought to charge bail. The court may, then, allow the writ, in this case, to be amended, by striking out the name of *Cook*. (*Underhill v. Devcreaux*, 2 *Saund.* 72. r.)

4. We admit, that the defendants, against whom judgment has been entered on the return of two *nihils*, are entitled to be let in to defend, if they disclose a good defence. (2 *Saund.* 72. u. notes.) Here, the defendants have not set forth their defence. But if the judgment should be set aside as to them, it ought to stand as to the others. Even in *assumpsit*, a judgment may be set aside in

part; (2 *Cuines's Rep.* 254.) and the proceedings are severable. (Cro. Car. 5. 8.)

*5. The *nolle prosequi* appears on the record, and if it discharges all the defendants, the judgment is erroneous, and may be reversed by writ of error. But we contend, that it discharges those only against whom it was entered. (*Salmon v. Smith*, 1 *Saund.* 207. n. 2.) In *England*, by the common law, land could not be sold on execution, but was put into the possession of the creditor, until, out of the rents and issues, he had satisfied his debt. Here the statute gives an execution against the lands of the debtor; and the sheriff, in case of terre-tenants, is to levy the debt out of the *lands* alone. In *England*, it was necessary to bring in the co-tenants in order to save to the others their right to a contribution; but, under our statute, the right of contribution does not exist. Contribution, in *England*, relates to the rents and issues. (3 Co. 14. *Harbert's case.*) Why compel all these terre-tenants to be brought in, when, if they were before the court, all the lands possessed by them could not be sold, but enough only to satisfy the judgment? And if the land held by the first terre-tenants who were summoned and appeared, was amply sufficient to satisfy the judgment, it would be idle to bring the others into court. This is not the case of a joint contract, where a *nolle prosequi*, as to one, discharges all the defendants, unless upon the infancy, &c. of the one. There is no contract whatever between the plaintiffs and the *terre-tenants*: the lands in their possession are alone liable. It is analogous to an action of ejectment, in which a *nolle prosequi* as to one discharges him only. (2 *Saund.* 207.) Such is the case, also, in real actions. (12 *Mod.* 654.) The pleas, here, were severable; and no case can be stated in which the defendants have less privity with each other. (Cro. Car. 518.) Many of the defendants pleaded *non tenure*; none of them pleaded any thing going in discharge of the judgment. As to the right of contribution against the tenants discharged by the *nolle prosequi*, it does not appear, that the lands of those tenants were ever liable to the judgment. They have not admitted the fact, as the present defendants have done, by suffering a default. But, admitting that they are liable to contribute, ought the plaintiff's execution to be delayed, until contribution is adjusted and enforced between the tenants? In *England*, where lands are *exten led* against *terre-tenants*, contribution may be enforced, *pari passu*, with the execution of the *elegit*; and that whether the tract of land be large or small. Execution is, therefore, delayed, until all are brought in. (3 Co. 14.) But here, where lands in the hands of different tenants, and to any extent, may be sold on execution, it is impossible to effect an equal contribution at the sale. Here are about 600 tenants, occupying more than 25,000 acres of land. The whole could not be sold; nor more than one lot, if that would produce sufficient to pay the debt. (*Wood v. Merrill*, 1 *Johns. Ch. Rep.* 505. *Jackson v. Newton*, 18 *Johns. Rep.* 362.) It would have been no benefit to the present defendants to have had the execution awarded against all. They would still have been obliged to proceed against the others; and, therefore, no

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objection exists to discharging a number of them by *nolle prosequi*. Our statute has pointed out a mode of enforcing contribution, peculiarly applicable to our practice; (1 *N. R. L.* 503.) and by which these defendants may compel the others to contribute. They have, also, a remedy at common law, by the writ *de contributione facienda*; (5 *Vin. Ab.* tit. *Contribution and Average*, p. 561.) or they may file a bill in chancery.

6. As to the defendants who were returned by the sheriff *scire feci*, the return cannot be contradicted. (2 *Str.* 813. 2 *Salk.* 601. *Cro. Eliz.* 872. 1 *Wm. Bl.* 394. 2 *Wm. Bl.* 873. 3 *Vin. Abr.* 323.) Neither *James* nor *Lewis* reside in *Otsego* county; and probably service could be, and was, made on their tenants. That the defendants who were summoned have a good defence, will not authorize the setting aside the judgment, after default. A terre-tenant who makes default on a return to a *scire facias*, cannot be let in to make a defence, however meritorious his defence may be. This is the established rule in *England*, and in this state. (*Jackson v. Robbins*, 16 *Johns. Rep.* 579. in *Error*, and cases there cited, per *Kent*, Ch. 3 *Vin. Abr.* 322. *Cooke v. Berry*, 1 *Wils.* 98. *Whitney v. Camp*, 3 *Johns. Rep.* 87. 2 *Saund. Rep.* 72. u note.)

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None of the defendants are entitled to costs. In *scire facias*, the plaintiff is not liable to costs, on becoming nonsuit, *or suffering a discontinuance, as to a part of the defendants, if he obtains a judgment against some of them. The statute (1 *N. R. L.* 345. s. 10.) applies only where there is a discontinuance as to *all* the defendants. (*Hullock's Law of Costs*, 142. 2 *Str.* 1105. 2 *Burr.* 1284.) Besides, after a plea in abatement, a plaintiff may discontinue without costs; (*Tidd's Pr.* 612.) and that, too, in *scire facias*. (*Poole v. Broadfield, Barnes*, 431. *Hullock*, 303. 1 *Str.* 638. 2 *Saund.* 72. note.)

Henry, in reply. The judgment is a *lien*, or it is not: If a *lien*, it is upon *all the lands* of *G. Croghan*, and which were sold by him to these terre-tenants. The right of contribution, therefore, must exist; otherwise, where several are bound, the creditor may select any one, or more of them, to bear the burden, and discharge the whole debt. Where there is a common burden imposed on several persons, the right of contribution exists between them, on the plainest principles of morality and justice. (2 *Saund.* 51. a. note. *Id.* 72. p. note.) The doctrine of contribution, is more necessary and just here, where lands are sold under execution, than in *England*, where they are held under an *elegit*. Our statute does not vary the common law doctrine, but embraces this most equitable and salutary principle of contribution, by allowing to a person, who has paid the whole of a judgment, where others are equally liable with him, a *scire facias*, to obtain contribution from the others.

A return of two *nihilis* to a *scire facias*, where the debt is *personal* merely, is absurd enough, and violates one of the clearest principles of justice, that no person shall be made to answer, until he has been summoned to appear. But in regard to a charge on *land*, if the sheriff returns that the tenant has *nothing* by which he

can be summoned, how can the court charge his land, as a *terre-tenant*, when, by the return, it appears that he has no land whatever. Here are tenants who have not been summoned, or warned at all, who have received no notice whatever; and they come, at the first day, and ask leave of the court to be let in, to plead. Suppose one tenant comes in and pleads payment of the whole debt; must there not be a *curia advisare vult*, until that plea is tried? And, if found for the defendant, must not the plaintiff go without day, as to all the defendants? Then, we say, this judgment must be set aside as irregular. It cannot stand in part, and be set aside in part. It was premature. One of the pleas had been demurred to. Can the plaintiff be permitted to leave any of the defendants he pleases out of court, and proceed against the rest? (Lord Raym. 600. Str. 783. 2 Bac. Abr. Error.) Several of the tenants have pleaded *non-seisin*.

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It has been said, that, because there was a revival of the judgment once against the heirs, without the leave of the court, a *scire facias* may go against the terre-tenants without leave. But the default, or acts of heirs, who are also terre-tenants, cannot effect or compromise the rights of the other terre-tenants.

If the death of *Hartwell* does not abate the suit, then his legal representatives must be brought into court by *scire facias*, which has not yet been done. The law on this subject is very fully and clearly laid down by Serjeant *Williams*, in his notes to *Jefferson v. Morton*, (2 Saund. 9. notes 8, 9, 10.) An imparlance is to be given to the tenants warned, until the other tenants are brought in. The judgment, therefore, in this case, has been premature and irregular. As, in an action against two joint tenants, if one only appears, you cannot proceed, until the other comes in. A lien on land does not survive; and, if it did survive, why have the plaintiffs proceeded against the legal representatives of some of the deceased tenants?

A *nolle prosequi* is equivalent to a discontinuance; and the defendants are entitled to costs. (*Cooper v. Tiffin*, 3 Term Rep. 511. 17 Johns. Rep. 268.)

SPENCER, Ch. J., delivered the opinion of the court.

Motions have been made for relief, in several cases, on the application of the terre-tenants, on different grounds, and on different notices, adapted to the different classes of cases. There is, however, one ground of relief common to all of them, and if that is tenable, it supersedes the necessity of discriminating the cases. The application for relief comes from persons against whom judgment has been entered *by default, at the *January* term, 1821, either on the return of two *nihils*, or upon returns of *scire feci*. In the former cases, there are affidavits of merits, and of surprise, from want of actual notice; and, in the latter, generally, of an intention to defend, and accounting for the omission to do so. The principle relied upon is, that, with respect to those who have appeared and defended, being upwards of four hundred terre-tenants of the same lands on which the judgment is a lien, a *nolle*

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prosequi was entered on the 9th of April, 1821; and it was also entered as to the heirs of Croghan.

It has been insisted, that the entry of the *nolle prosequi*, as to a part of the terre-tenants, is a discontinuance of the action, as to all the others; and that it is in the nature of a *retraxit*, enuring to the benefit of those who did not defend, from whatever cause.

The law applicable to this question is laid down with entire precision and accuracy, by Serjeant *Williams*, in his 4th note to 2 *Saund.* 51. a. He says, that, although the judgment survives, as to the personalty, yet it does not as to the real estate; for, at common law, the plaintiff might take the goods of the survivor in execution by a *fi. fa.*; but the plaintiff, under the statute of *Westminster 2*, must sue out an *elegit* against the lands of the survivor, and the heir and terre-tenants of the deceased; and that, where the lands of several are charged with a debt, it shall not be wholly on the survivor; as, if a recognizance be acknowledged by several, the lands of them all are thereby become chargeable, and execution *must* be equally made; and if one dies, the creditor *must* bring a *scire facias* against his heir and terre-tenants, and also against the survivors; but it is otherwise where the lands are not bound: as, if two enter into a bond, and one dies before judgment, the survivor shall be charged alone. He states the case where judgment in debt was had against two, and one died; the plaintiff brought *scire facias* against the survivor only; the defendant pleaded, that the other had left lands and an heir, upon whom they had descended, and demanded judgment, if he should be compelled to answer, without the heir being warned; the plaintiff demurred, and judgment was given, that the defendant *should* answer, for that the judgment was against the person; and although now, by the statute of *Westminster 2*, which gives the *scire facias* and *elegit*, he may charge the lands, and make the judgment real, yet it is at his election, to proceed in the personalty, if he will; but if he will take out execution upon the *real lien*, the charge must be equally against both, and the *scire facias* against both. Serjeant *Williams* refers to several cases in support of this doctrine, and they fully support him, particularly Sir *William Harbert's* case, 3 *Co.* 11. Many cases are there noticed, that, where the charge is upon the land, which was in the hands of several persons when the charge was created, as in the case of a recognizance, the conusee cannot extend the land of one conusor only, but all must be equally charged. So, if there be only one conusor, if divers persons purchase the lands subject to the recognizance, one only of the conusors shall not be charged, for he stands in equal degree with the others. The case of Sir *John Langford* is there stated, which was thus: Four men were bound in a recognizance, and afterwards one died, and his heir being within age, a *scire facias* was brought against the three survivors to have execution, who pleaded, that the heir of the conusor, who was dead, was within age, and as, during his minority, he could not be charged, and the survivors ought not to be charged, they prayed judgment. The fact not being denied, it was awarded, that the *parol* should *demur*, and the judgment was affirmed in error. So, if two men aliene

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lands with warranty, the lands of one only shall not be rendered in value; neither, if one dies, shall the lands of the survivor only be rendered in value, but the charge shall be equal on them both; for a joint lien binding the lands shall not survive, or lie only on the survivor. *Coke* cautions the reader to note, that where it is said, before and often, in our books, that if one purchaser only be extended for the whole debt, he shall have contribution, it is not thereby intended that the others shall give or allow him any thing, by way of contribution; but it ought to be intended that the party who is alone extended for the whole, may, by *audita querela*, or *scire facias*, as the case requires, defeat the execution, and thereby he shall be restored to all the mesne profits, and *compel the conu-see to sue execution of the whole land; so in this manner every one shall be contributory, that is, the land of every terre-tenant shall be equally extended. The case of *Elsar v. Smart* (Sir T. Raym. 26.) is, also, to the same point. There, a judgment was against two; one died, and a *scire facias* issued against the survivor; there was a plea, that he who died had an heir, who was in full life. On demurrer, the plaintiff had judgment. *Wyndham, J.*, said, that the reason why this execution should be against the survivor, was, because the plaintiff may take a *fi. fa.* if he will, and perhaps he will not charge the land. *Twisden, J.*, was of the same opinion; and he said, if, upon this *scire facias*, the plaintiff takes an *elegit*, the defendant may have an *audita querela*, or he may suggest this matter, on the return of the *elegit*, and have a *supersedeas*. In *Pennoir v. Brace*, (1 Salk. 320.) *Holt, Ch. J.*, held, that a *capias*, or *fi. fa.*, being in the personalty, might survive, and might be sued against the survivors, without a *scire facias*; otherwise of an *elegit*, for there the heir is to be contributory.

I apprehend the law to be well settled, since the statute of *Westminster 2*, that, where the judgment creditor proceeds to enforce his lien on the realty, and, for that purpose, it becomes necessary to revive the judgment, he is bound to make every person having a fee in the land a party to the proceeding; and, in this case, the judgment against *Croghan*, being a lien on the real estate, in the hands of the terre-tenants, the plaintiffs are required by law to make all the terre-tenants parties to the *scire facias*, to the end that they may be made jointly contributory to the satisfaction and payment of the judgment. This has been shown to be the established principle, under the statute of *Westminster 2*, which gave the creditor his remedy by the execution of *elegit*, under which he held the moiety of the debtor's lands, until he was satisfied his debt and damages. At common law, the *fi. fa.* went merely against the goods and chattels of the debtor; such an execution, therefore, related merely to the personalty; but, under our statute, which subjects the lands and tenements of the debtor to be sold, absolutely, for the satisfaction of the debt, it is, ordinarily, an execution partly in the personalty, and partly in the realty; *and, in the present instance, it is entirely in the realty, for the goods and chattels of the terre-tenants cannot be affected by the judgment, or any execution under it. The same principle which required the *elegit* to issue against all who ought to bear

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the burden, applies with much more force to the *fi. fa.* against the lands; for, in the former case, they were not to be sold, but a moiety only held, until the debt was paid; whereas, in the latter case, they are liable to be taken away forever from the debtor. Besides, the principle is most just and equitable; if the creditor, having the *lien*, can select a few, as in this case, to bear the whole burden, they may, probably, be crushed by its weight; but, if he must render them all contributory, the individual burden may be borne without ruin.

It was supposed, on the argument, that our statute, (1 N. R. L. 503.) (a) giving remedy by way of contribution, where several persons are bound by a judgment, and one pays more than his share, had a bearing on this question. I apprehend that it has none. It merely provides for the case of an undue proportion of a judgment having been paid by, or levied upon the lands of, one of the persons liable to a judgment. It does not profess to settle any principle, whereby the one may be subjected to pay more than his proportion, but merely gives a remedy where the case occurs. It seems to follow, from the principles to which I have referred, that the plaintiffs cannot have proceeded correctly, in entering a *nolle prosequi* against those who have appeared and pleaded, taking judgment against such as have not pleaded; and that they cannot be allowed to enforce the judgment thus taken.

The next question, under these circumstances, is, What relief is to be afforded to those against whom judgments have thus been taken, and what is the effect of the *nolle prosequi*? The law has undergone a change in relation to the right of a plaintiff to enter a *nolle prosequi*, and as to the effect of it. It may be entered as to one of several defendants, in actions of *tort*, without affecting the plaintiff's right to proceed against the others; for, in such cases, the plaintiff has his election to sue them severally or jointly. So, where one of the defendants pleads matter which goes to his personal discharge, in an action necessarily joint, as in *assumpsit*, or debt, such as bankruptcy, that he was never executor, and, under the decisions of this court, infancy, and such pleas as do not go to the *action of the writ*; in these cases, a *nolle prosequi* may be entered as to one defendant; but where all the defendants are necessarily parties, and the plaintiff was obliged to make them parties, as in the proceedings against the *terre-tenants*, a discontinuance as to some, is a discontinuance as to all. In the case of *Noke and Chiswell v. Ingham*, (1 Wils. 89.) the action was upon promises. *Noke* pleaded a plea that was found against him, and judgment was rendered thereon. *Chiswell* pleaded a discharge as a bankrupt, and, as to him, a *nolle prosequi* was entered; and, on error, the court affirmed the judgment, on the ground that it was a personal discharge, and not a plea to the action. *Denison, J.*, said, that if one defendant was to plead a plea that was to go to the action of the writ, he thought it might then have a different consideration; and, I think, Serjeant *Williams*, in his second note to 1 *Saund.* 207. evidently intimates, that in the case put by *Denison, J.*, it would be fatal. Mr. *Tidd* (*Tidd's Pr.* 632.) comes

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(a) 2 Rev. Stat. 363.

to the same conclusion. In *Chandler v. Parkes and Danks*, (3 *Esp. N. P. Rep.* 76.) where, in an action for work and labor, one defendant pleaded the general issue, and the other infancy, to which last plea a *nolle prosequi* was entered, Lord *Kenyon* nonsuited the plaintiff, on the ground that the action was gone. This seems to be the inevitable consequence, in this case; for here, the plaintiff, being under the necessity to make all the terre-tenants parties, and to proceed against them all, until he was satisfied, has by his own act disabled himself from doing so. He cannot proceed against part of the terre-tenants, and discontinue as to part; and, having discontinued, he can proceed no further. The defendants are, then, entitled to their motion to set aside the defaults and judgments against such of the terre-tenants as have not pleaded, on the ground that the plaintiffs have entered a *nolle prosequi* as to such as have appeared and pleaded; and they are entitled, also, to be paid the costs of this motion.

The only remaining question is, whether the plaintiffs are *liable to pay the costs, as in a case of discontinuance, as to such of the defendants with respect to whom a *nolle prosequi* has been entered; and whether judgment is to be given for such costs, or the defendants are to be put to a prosecution of the bond given under the direction of this court.

The 11th section of the *act concerning costs*, (1 *N. R. L.* 345.) gives the defendant costs, if the plaintiff suffers the suit to be discontinued; and it is a transcript of 8 *Eliz.* ch. 2. s. 2. In *Cooper v. Tiffin*, (3 *Term Rep.* 511.) the court held, that a *nolle prosequi* could not be distinguished, in reason, from a discontinuance; and that the practice had been to give costs in such cases. *Tidd's Pr.* 630. is to the same effect. The motion is in the alternative, either for a judgment for costs, or for a rule that *George W. Prevost*, the assignee of the judgment, pay the costs; and that the bond of *Andrew Edmonston*, filed as security for the payment of costs, to *James Cooper*, *George Pomeroy*, and others, be given up to the defendants to be prosecuted. I incline to the opinion that the latter course would be most appropriate. Several other points were discussed on the argument, but the necessity of considering them is obviated by the opinion already expressed.

Motion granted accordingly

VAN NESS *against* HAMILTON and others.

WELLS, for the plaintiff, moved to vacate two several orders of the recorder of the city of *New-York*, made in the above cause; and for a rule that a writ of inquiry of damages issue in the cause, to be executed before one of the judges of this court. He read an affidavit, stating, that at the last *January* term, the court, on demurrer, overruled the special pleas put in by the defendants;

of a judge, at his chambers, or of the recorder of the city of *New-York*, extending the time of a judge, at his chambers, or of the recorder of the city of *New-York*, extending the time court, is irregular and void.

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Where a rule on a judgment of the court, on demurrer, gives a party leave to amend his plea, within a certain specified time, on payment of costs; an order allowed by the

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but gave them leave to amend the pleas in *forty days*, on payment of costs. That, *a few days before the expiration of the forty days, the *recorder* (Mr. *Riker*) granted an order, extending the time to amend forty days more; and on the 15th of *April* last, the recorder granted a second order, extending the time to amend to the last day of the present term, to give the defendants an opportunity of applying to the court to point out and specify to them such further particulars, not referred to in the opinion delivered by the chief justice, on the decision on the demurrer, wherein the pleas, in the judgment of the court, were considered defective.

Wells contended, that the orders of the recorder were wholly irregular and void. In *Stansbury v. Durell*, (1 *Johns. Cas.* 396.) the court decided, that where proceedings are stayed upon certain conditions, those conditions must first be complied with, before the defendant can be entitled to the benefit of the rule; and that it was irregular to apply to a judge, at his chambers, for any further order.

J. Hamilton, contra, objected, that the plaintiff should have first applied to the *recorder* to revoke the orders, &c. He read a petition of the defendants, pursuant to a notice given to the plaintiff's attorney, praying the court to point out and specify such further particulars, not referred to in the opinion of the court on the demurrer, wherein the pleas are, in the judgment of the court, defective, and to allow the defendants a reasonable time, after they shall receive the instruction of the court, to amend their pleas conformably thereto.

Per Curiam. The recorder of the city of *New-York* had no jurisdiction whatever to grant these orders. The *time* allowed by the court was one of the *conditions* on which we granted the defendants leave to amend their pleas, when judgment was given for the plaintiff, on the demurrer. It was *res judicata*. The recorder had no power or authority to vary the judgment of this court. His orders, therefore, were null and void; and we grant the motion to vacate them; and we give the defendants *forty days*, from the end of the *present term, to plead anew, upon the terms and conditions of the rule in *January* term last, without costs on either side.

Rule accordingly.

A. PELL, and his Wife, (Executrix of E. PUGSLEY,) against
C. PELL, and his Wife.

Where the husband and wife were sued jointly, on a bond executed

M'COUN, for the plaintiffs, moved for leave to enter a *nolle prosequi*, as to the defendant, *Martha Pell*, and to amend the declaration, accordingly, against *C. Pell*, as if his wife had not been by them jointly, the plaintiff was allowed (before plea) to enter a *nolle prosequi* as to the wife; and amend his declaration accordingly, as if the suit was against the husband alone, on payment of the costs of such amendment (a,

(a) *The Comm. Co. v. Russ*, 8 *Cow. Rep.* 122. *Ex parte E. Nelson*, 1 *Id.* 417.

made defendant. The action was debt on a bond executed by the defendants, *jointly*, to *Elizabeth Pugsley*, the testatrix; and the plaintiff declared against them as joint obligors. The defendant served a demurrer to the declaration, (which had been filed *de bene esse*,) assigning, as a special cause, that the action was brought against the husband and wife jointly, when it ought to have been against the husband alone. But the plaintiff's attorney returned the demurrer, because no special bail had been filed in the cause.

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Silliman, contra, objected, that where a wife is made a party, the plaintiff cannot enter a *nolle prosequi*; but must discontinue, and commence a new action against the husband alone. (1 *Chitty's Pl.* 32, 33. *Tidd's Pr.* 631. *Chandler v. Parkes* and *Danks*, 3 *Esp. N. P. Rep.* 76.)

Per Curiam. Motion granted, on payment of the costs occasioned by the amendment.

Rule accordingly.

*GENERAL RULE.

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" May 18, 1822.

" ORDERED, 'That the rule of *November* term, 1803, which provides that every person who shall have regularly pursued juridical studies, under the direction or instruction of a professor or counsellor at law, within this state, for four years, shall be admitted as counsel in this state, be annulled; provided, that this repeal shall not affect any person who shall already have commenced such studies."

END OF MAY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN AUGUST TERM, 1822, IN THE FORTY-SEVENTH YEAR OF OUR
INDEPENDENCE.

BAILEY *against* WARDEN.

A *sheriff*
cannot be bail
in an action in
this court.

MOTION to set aside a justification of special bail. It appeared that the *sheriff* of the county of *Steuben*, together with another person, had become special bail for the defendant, on the return of the writ of *habeas corpus cum causa*, in this cause; and that both of them justified before a *commissioner*.

Per Curiam. We have decided that an *attorney* is not good bail, if excepted to; and, for the same reason, we think a *sheriff* ought not to become bail; and such is the rule of the *English* courts, which do not allow any person concerned in the process of the court to become bail. We, therefore, grant the motion. (a)

Motion granted.

(a) Vide 1 *Dowl. Pr.* 171. *Str.* 890. *Doug.* 466. 2 *Bbs. & Pull.* 150. 15 *Johns. Rep.* 535

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*PARKER *against* PARMELE.

By an agreement, under the hands and seals of the parties, for the sale and purchase of a lot of land, the defendant covenanted to pay 250 dollars, as the consideration-money, on the 1st of Janu-

THIS was an action for a breach of covenant. The plaintiff declared on an agreement, under seal, dated *November* 15, 1816, by which he agreed to sell to the defendant, and the defendant agreed to purchase of the plaintiff, one acre of land; (particularly described;) and the defendant covenanted and agreed to pay the plaintiff, as the consideration of the purchase, two hundred and fifty dollars on the 1st of *January*, 1818, with lawful interest, &c.; and the plaintiff "covenanted and agreed, that, upon the faithful performance of the covenants aforeaid, he would execute to the

defendant, his heirs and assigns, a good warranty deed of conveyance of the premises." The declaration then averred, that, though the plaintiff hath, always, from the time of making the said agreement, hitherto, well and truly performed, fulfilled, and kept, all things therein contained, on his part to be performed, &c., and hath, at all times, since the said sum of money, in the said agreement mentioned, became due and payable, been ready and willing, on the payment of the same to him by the defendant, to execute to the defendant a good warranty deed of conveyance of the said premises, according to the tenor and effect, and true intent and meaning of the said agreement; yet, protesting &c., the defendant, on the 1st of *January*, 1818, did not pay to the plaintiff the said sum of two hundred and fifty dollars, with interest, &c.; nor hath he, at any time since, paid the same, or any part thereof, &c.

The defendant, after craving *oyer* of the agreement, pleaded, *first, that the plaintiff, on the 1st of *January*, 1818, was not seised, nor at any time since had been seised, of any good, valid and operative title, in and to the said land; and that he, then, had not, nor has he, at any time since, had good, right and lawful power and authority, to give to the defendant a good warranty deed of conveyance of the said land, &c. 2. That the plaintiff did not, on the 1st of *January*, 1818, tender or offer to execute to the defendant, a good warranty deed of conveyance of the premises, &c.; nor has he, at any time since, tendered or offered to execute, &c.; wherefore, he prayed judgment, &c.

To these pleas there was a general demurrer, and joinder.

S. M. Hopkins, in support of the demurrer, contended, 1. That, by the terms of the agreement, the payment of the money was a condition precedent to the defendant's right to demand a deed. He said, that the case of *West v. Emmons* (5 *Johns. Rep.* 179.) was perfectly analogous, and conclusive in support of this point. (*Cunningham v. Morrell*, 10 *Johns. Rep.* 203. *Pordage v. Cole*, 1 *Saund.* 319. 1 *East*, 203.) It is not enough, therefore, for the defendant to aver a readiness to perform; but he must go further, and aver that he offered or tendered to perform. 2. That the plea of *non-seisin* in the plaintiff was bad, and no answer to the declaration. (*Gazely v. Price*, 16 *Johns. Rep.* 267.)

Lynch, contra, relied on the cases of *Judson v. Wass*, (11 *Johns. Rep.* 525.) and *Clute v. Robinson*, in error, (2 *Johns. Rep.* 595.) In support of the second plea, he cited *Green v. Reynolds*, (2 *Johns. Rep.* 207.) and *Van Benthuyzen v. Crapser*, (8 *Johns. Rep.* 257.)

SPENCER, Ch. J., delivered the opinion of the court.

1. Is it competent to the defendant to draw in question the plaintiff's title to the lot? and what is the true and just construction of the plaintiff's covenant as to title?

the first of *January*, 1818, nor at any time since, tender, or offer to execute a good warranty deed of conveyance of the premises, to the defendant, is a good bar; for the vendor cannot maintain an action for the purchase-money without having executed, or actually tendered, a conveyance. (a)

(a) Vid. *Dale v. Roosevelt*, 9 *Cow. Rep.* 307. *Fuller v. Hubbard*, 6 *Ibid.* 13. *Champion v. White*, 5 *Ibid.* 509.

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ary, 1818; and the plaintiff covenanted, that, upon the performance of the covenant to the defendant, he would "execute to him, his heirs and assigns, a good warranty deed of conveyance of the land."

In an action for

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a breach of the covenant of the defendant, the declaration alleged, that the plaintiff was, and had been, at all times, ready and willing, on payment of the 250 dollars, &c., to execute a good warranty deed of conveyance, &c., but that the defendant did not pay the 250 dollars, &c.: Held, that the covenants were dependent; that the words "a good warranty deed of conveyance" referred to the instrument of conveyance only, and not to the title: that a plea, therefore, that the plaintiff was not seised, &c., or that he had no title, was not good, or sufficient, in avoidance of the action; for where the action is on a deed or specialty, a mere failure of consideration is no defence at law. But a plea that the plaintiff did not, on

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In *Gazely v. Price*. (16 *Johns. Rep.* 268.) I delivered the opinion of the court, and supposed I had not only expressed the opinion of my brethren, but had also given effect *to the spirit of all the antecedent cases upon the subject. I shall endeavor to show that that case was rightly determined, and that it governs this case, in the point now under consideration. The words of the agreement there, were, "that the plaintiff *covenanted to give the defendant a good and sufficient deed for the premises,*" on a particular day. One of the defendant's pleas was, that on the day when the deed was to be given, the plaintiff was not lawfully and rightfully seised of a good, sure, and indefeasible estate of inheritance in the premises, and had not good, right, and lawful power and authority, to grant and convey the same.

I considered the covenant, in that case, as relating merely to the validity and sufficiency of the conveyance, in point of law, to pass whatever right the plaintiff had in the lands, to the defendant; and the case of *Van Eps v. The Corporation of Schenectady* (12 *Johns. Rep.* 442.) was referred to, as substantially deciding the question. I held, that the additional words, "good and sufficient," directed only the species of deed to be given, and had no reference to the title to be conveyed.

Here, the plaintiff's covenant is, *to execute a good warranty deed of conveyance of the lot*; and if the case of *Gazely v. Price* was correctly decided, it puts an end to the question; for no human ingenuity is capable of discriminating the two cases. The case supposed to hold a different doctrine, is that of *Clute v. Robinson*, in the Court of Errors; (2 *Johns. Rep.* 595.) and it is true, that the then Ch. J. *Kent* did say, that a covenant *to execute and deliver a good and sufficient deed* of a piece of land did not mean merely a conveyance, good in point of form, but an operative conveyance; one that carried with it a good and sufficient title to the lands to be conveyed; and he proceeds to say, that the appellant confessed, in his answer, that this was the understanding of the parties, as his title was not then complete. In the particular case, the opinion expressed was perfectly correct; but we must remember, that this case was on an appeal from the Court of Chancery; and I fully concur in the proposition, that where a party seeks the aid of a court of equity, to enforce a specific execution of an agreement, for the acceptance of a conveyance of a *piece of land, under a covenant to execute a good and sufficient deed, and to compel the payment of the money stipulated to be paid, as the consideration for the conveyance, it would be a good defence, that the party had no title. Whether the same rule prevails at law, is the question. The next case relied on, and it is a case in this court, is that of *Judson v. Wass*, (11 *Johns. Rep.* 525.) That was an action of *assumpsit*, to recover damages for the breach of an agreement for the purchase of land. The lands were sold at auction, and the defendant became the purchaser of some of the lots; and, refusing to perfect the contract, the suit was brought. One of the conditions of sale was, that, after payment, or a note given, by the purchaser, for the consideration-money, the plaintiff and his wife should execute and acknowledge a deed, with war-

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ranty of title, except as to quit-rents. It appeared, on the trial, that the lands sold were under a mortgage to *Douw Fonda*, executed prior to the sale, for nine thousand dollars. It was decided, that in every sale like that, there is a condition that the purchaser shall not be bound to part with his money, unless the seller is able to give him a title, according to the terms of the sale; that the conditions of sale meant not only that the plaintiff would execute a deed, containing a covenant of warranty, but that he had the power to give a deed which would carry an indefeasible title to the lots; that the conditions of sale specified the quit-rents as the only encumbrance, which excluded the idea there were any other.

Now, the material difference between the case of *Judson* and *Wass*, and this case, is, that the former was *assumpsit*, to recover the consideration-money, and this is an action upon a covenant under the hands and seals of the parties. It is perfectly competent to the defendant, in *assumpsit*, to set up a failure of consideration, as a complete defence. In that case, the lots sold were heavily encumbered; that encumbrance had not been made known to the purchaser; and one of the conditions of the sale was, that the lands should be subject only to a quit-rent. There was, then, a failure of consideration; and, in fact, a fraud on the purchaser, in the representation of his title to the land. The defence was perfect, and conformable to all the decisions on the subject. *But can the defendant set up, in this action, a failure of consideration, on the ground that the plaintiff had not a good title to the land contracted to be conveyed? That is the only question presented by the first plea.

In *Vrooman v. Phelps*, (2 *Johns. Rep.* 177.) it was expressly decided, that a specialty could not be invalidated for any other cause than the illegality of the consideration. And it is there stated to have been repeatedly decided, that the breach of a written warranty, as to the quantity of the goods sold, made antecedently, though false and fraudulent, and though it may have induced the defendant to make the purchase, cannot be pleaded in discharge of a bond given for the consideration. Subjoined, in a note to this case, is the case of *Dorlan v. Sammis*, upon a writ of error to the Common Pleas of *Queens*, in which this court said, there is no case in which a bond can be set aside, but where the consideration is void in law, or where there is fraud. A mere failure of consideration is no defence at law. That this doctrine is well founded, the case of *Collins v. Blantern*, (2 *Wils.* 347.) and 1 *Fonb.* 112. in the notes, fully show. *Powell* (on *Contracts*, vol. 1. p. 333.) is very full on this point. He says, the cause or consideration is not inquirable into, but the party ought only to answer the deed. It is not for me to question the wisdom of the common law, in denying to a party who has entered into an agreement, under his hand and seal, a right to impeach it, on the ground of a want of consideration. It is sufficient that the law is so. The plea in avoidance of a payment of the money stipulated to be paid, in effect, says, that the defendant ought not to pay it, because the plaintiff did not own the land on the day he agreed to convey it, nor has he since owned it. This is showing that there existed no

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consideration, as regarded the defendant; for if he paid, he would get no equivalent for his money. In all the books of precedents, I do not believe there is such a plea to be found. One word more, as to the plaintiff's covenant *to execute a good warranty deed of conveyance of the lot to the defendant*. It appears to me, that it is impossible to torture the expression, to mean, that he will give a good title. It is to be *a good warranty deed of conveyance*. The word "*good*" refers only to the instrument of conveyance; *it does not mean that he will give a good warranted title. I am far from supposing, that if the fact set up in the plea be true, that the defendant is remediless. On the contrary, no doubt, he would be entitled to the aid of the Court of Chancery, to protect him from paying his money for a piece of land, which, though the plaintiff should warrant it to be his, yet he did not own. All I contend for is, that a court of law should not innovate upon ancient and uniformly settled principles, from the notion, that there is a particular hardship or injustice in the case. We must leave parties to their remedies, according to known principles. The case of *Van Eps v. The Corporation of Schenectady*, was an action for money had and received, and the plaintiff was allowed to recover back that part of the consideration-money, as to three lots, that were held adversely to the title of the defendants. In that action, the court adopted the principle, which prevails in equity, that the vendee was entitled to a good title; and, as he had paid his money upon a defective one, he was entitled to have it back. That doctrine is entirely inapplicable to a case where the agreement is by *deed*, and where the extent of the covenant, and its import only, are in question.

2. The *second* plea is, that the plaintiff did not, on the 1st of *January*, 1818, tender, or offer to execute, to the defendant, a good warranty deed of conveyance of the lot, nor has he since offered and tendered, &c. The case of *Gazely v. Price* shows, that the covenants in this case are dependent. The whole consideration-money was to be paid on that day: and, on the payment, the deed was to be given; the acts were to be concurrent. This was fully and clearly settled, in the case of *Green v. Reynolds*, (2 *Johns. Rep.* 207.) and in *Jones v. Gardner*, (10 *Johns. Rep.* 266.) The same principle was, also, adopted in *Porter v. Rose*, (12 *Johns. Rep.* 212.)

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Then the question arises, whether the plaintiff, the vendor, can maintain this action, without an actual tender, or offer to convey. The averment in the declaration is, only, that he was ready and willing to convey. In *Green v. Reynolds*, the court say, that on such a covenant, the fair intent and good sense of the contract is, that the money is *not to be paid until the deed is ready to be delivered; and that the declaration was defective, in not averring a tender of the deed by the plaintiff. So, in *Jones v. Gardner* the same principle is repeated. In *West v. Emmons*, (5 *Johns. Rep.* 181.) *Van Ness, J.*, puts the decision on the order or precedence in which the acts are to be done. There, the defendant was to give a deed, and the plaintiff was to execute a bond and mortgage; and he held, that an averment of a readiness to exe-

cute the bond and mortgage was enough, because the mortgage would be inefficacious until after the deed was given. *Sugden* (*Law of Vendors*, 162, 163.) lays down the law thus: that a vendor cannot bring an action for the purchase-money, without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing; and that, on the other hand, a purchaser cannot maintain an action for a breach of contract, without having tendered a conveyance, and the purchase-money. In the case of *Philips v. Fielding*, (2 H. Bl. 123.) which was a case very similar in its facts, it was decided, that an actual conveyance or a tender and refusal, was essentially necessary. Here, however, the defect in the averment, instead of being taken advantage of by demurrer, has been pleaded; and, certainly, the facts pleaded are sufficient to bar the plaintiff's action, if well founded:— There must be judgment for the defendant, with leave to the plaintiff to reply.

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Judgment for the defendant, accordingly. (a)

(a) Vide *Robb v. Montgomery*, ante, p. 15. and *Hudson v. Swift*, ante, p. 24.

*Root, Administratrix of EDWARDS, against TAYLOR.

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THIS was an action of *assumpsit*, tried at the *Montgomery* circuit, in *November*, 1821, before Mr. Justice *Platt*. The declaration contained counts for goods sold and delivered, the common money counts, and on an account stated. The defendant pleaded the general issue, with notice of special matter to be given in evidence at the trial.

In an action brought by an administrator, for a debt due to his intestate, the defendant cannot set off a debt due from the intestate, purchased by the defendant after the death of the intestate.

The plaintiff proved a debt, due from the defendant to the intestate, amounting, with interest, to 427 dollars and 21 cents. The defendant, under the notice subjoined to the plea, offered, by way of set-off, a promissory note, dated *April* 2, 1818, signed by the intestate, and *Hugh Sandford*, by which they promised, jointly and severally, to pay *Newman Baxter*, or order, five hundred dollars, in one year after date. It was proved that the intestate died on the 9th of *February*, 1820; and that, on the 13th or 14th day of the same month, a few days after the death of the intestate, the defendant purchased the note of *Baxter*, who endorsed the same to him, for 240 dollars. It was admitted, at the trial, that at the time the note was so transferred to the defendant, three judgments were outstanding against the intestate, more than sufficient to cover all his assets. The judge decided, that the set-off could not be allowed, and directed the jury that they should find for the plaintiff, for the amount of her demand; and the jury accordingly found a verdict for the plaintiff, for 427 dollars and 21 cents.

(b)

A motion was made for a new trial.

(b) Vid. *Budge v. Johnson*, 5 *Wendell's Rep.* 342. *Fry v. Evans*, 8 *Id.* 530, and the cases there cited.

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H. Fish, for the defendant. He cited 10 *Johns. Rep.* 366. *Chitty on Bills*, 96. 254. *Toller's Law of Executors*, 225. *Montagu on Set-off*, 34. note. *Buller's N. P.* 180.

Van Vechten and Baldwin, contra. They cited 6 *Term Rep.* 57. 16 *East's Rep.* 130. 1 *N. R. L.* 518. (a) *Montagu on Set-off*, 85. note. *Kilvington v. Stephenson, Willes*, *103. and 264. note. 1 *Johns. Cas.* 52. 2 *Caines's Cases in Error*, 312. 2 *Johns. Rep.* 278. 12 *Johns. Rep.* 346.

SPENCER, Ch. J., delivered the opinion of the court.

The statute, (1 *N. R. L.* 515. sess. 36. c. 56.) (b) provides, that if two or more persons, dealing together, *be indebted to each other, or have demands, arising on contract or credits, against each other*, and one of them, or his or her executors or administrators, sue any one or more of the others, his or their executors or administrators, in any court, &c., if the defendant cannot gainsay the deed or assumption, upon which the suit is brought, it shall be lawful for such defendant to plead the general issue, and give notice in writing, with the said plea, of what such defendant will insist upon at the trial, for his or her discharge, and to give any such bond, bill, receipt, account, contract, credit or demand, so given notice of, in evidence. . The act then provides, that if it shall appear that the sum demanded is paid, the jury shall find for the defendant, and he shall recover his costs; if any part shall be found to be paid, then so much shall be discounted, and the plaintiff have judgment for the residue. If the plaintiff is overpaid, then the jury shall find for the defendant, and certify the balance, whereon the defendant shall have judgment, *unless the plaintiff prosecute as executor or administrator, in which case, the sum so certified shall be deemed a debt of record, to be paid in the course of administration.*

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Were the intestate and the defendant indebted to each other, or had they demands arising on contracts or credits against each other? If they were not indebted to each other, or if they had not demands arising on contracts or credits against each other, the case is not within the letter or spirit of the act. In *Gordon v. Bowne*, (2 *Johns. Rep.* 155.) this court held, that the statute of 2 *Geo. II.* ch. 22. s. 13. which enacts, that *where there are mutual debts between the parties*, they may be set off; and our statute, which provides, that *if two or more persons, dealing together, be indebted to each other*, were expressions of the same import, and that the *English* decisions upon the construction of their statute, are in point as to the construction of our act. In *Kilvington v. Stevenson*, in a note in *Willes's Rep.* p. 264. the *action was *assumpsit*, as executor, for goods of the testator. There were two pleas, *non assumpsit*, and a *set-off*, for a debt due from the testator to the defendant; to this there was a demurrer, and the court held the plea to be clearly bad. They said, this was not an action for goods that were in the defendant's hands, at the testator's death, in which case he might set off; but for goods he

(a) 2 *Rev. Stat.* 355. § 23.

(b) 2 *Rev. Stat.* 354, 355.

has taken possession of since his death ; in which case, to allow the set-off, would be altering the course of distribution. The decision in this case was approved of and confirmed by Lord Mansfield, in *Tegetmeyer v. Lumley*, also cited in the note to *Wilkes*, before referred to. There is another class of cases, which will more forcibly illustrate the construction to be put on this statute. In the case of *Ogden and others, assignees of Olcott v. Cowley*, (2 Johns. Rep. 274.) the action was by the plaintiffs, as assignees, under the bankrupt law, against the defendant, as surviving endorser of a promissory note. There was notice of a set-off for money lent to, and for money had and received by the bankrupt, before his bankruptcy. The defendant gave in evidence two checks issued by the bankrupt, and offered to prove, that one of them, though dated afterwards, was, in fact, given antecedent to the act of bankruptcy. The set-off was objected to, unless it was proved, that the checks were held by the defendant, at or before the 8th of October, 1800, the day *Olcott* became a bankrupt ; but no evidence of the fact was given. On this evidence, the judge directed a verdict for the plaintiffs, without allowing the set-off ; and, on a motion for a new trial, this court confirmed the decision at *nisi prius*, and adopted the principle settled by the case of *Dickson v. Evans*, (6 Term Rep. 57.) that it would be unjust if one person, who happened to be indebted to another, at the time of his bankruptcy, was permitted, by an intrigue between himself and a third person, so to change his own situation, as to diminish or totally destroy the debt due to the bankrupt. In the case of *Dickson v. Evans*, Lord Kenyon expressed a decided opinion, that there was no difference in the rule as to set-offs, under the statute of set-offs and the statute 5 Geo. II. c. 30. ; so that we may consider the decision, in *Dickson v. Evans*, as applicable to the English statute of set-off, and, consequently, *to our statute. In *Dale v. Cooke*, (4 Johns. Ch. Rep. 13.) the chancellor held it to be an established rule at law, that if executors sue for a debt created to them since the testator's death, the defendant cannot set off a debt due to him from the testator, as it would be altering the course of distribution. My conclusion is, that this is not a case within the statute ; that the intestate and the defendant never were indebted to each other, and had not demands arising on contracts or credits against each other ; and that it would be unjust, and against the whole policy of the statute, to allow a set-off of a debt acquired against the estate of a deceased person, subsequent to his death.

Motion for new trial denied.

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Root
v.
TAYLOR

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ALBANY,
August, 1822.

FIELD
v.
PARK.

FIELD *against* PARK

Service, on a *Sunday*, of a notice, and affidavits, or other papers, which are to be the foundation of a motion for a rule, is irregular and void. (a)

AFTER the notice of a motion in this cause, and affidavit of the service were read, the counsel for the defendant raised a preliminary objection to the regularity of the service of the notice, though more than *four* days, exclusive of the day of service, on the ground of its having been made on a *Sunday*.

Per Curiam. This point has never before been presented to the court: we are, therefore, entirely unshackled by any former decision; and are at liberty to adopt such rule, as good order and the spirit of the 5th section of the act for suppressing immorality, (2 *N. R. L.* 195. sess. 36. c. 24.) may require. That section forbids the service, on *Sunday*, of any writ, process, warrant, order, judgment or decree, in civil causes; and declares the service thereof to be void, and the person executing the same liable for damages at the suit of the party aggrieved. Our statute, in this respect, is substantially a transcript of the statute 29 *Car. II.* ch. 7. s. 6.; and, under that statute, it has been decided, that a rule nisi, for an attachment for non-payment of money, could not be served *on *Sunday*. (8 *Term Rep.* 86.) In that case, Lord *Kenyon* expressed an anxious wish to preserve, as much as possible, a strict attention to the *Sabbath*. It has been held, also, that service of a copy of process on a *Sunday*, was absolutely void; and Lord *Ellenborough* said, it was matter of public policy, that no proceedings of the nature described in the statute, should be had on *Sunday*. (3 *East's Rep.* 155.) It has also been decided, that notice on a *Sunday*, of a plea being filed, was irregular and invalid; and Lord *Ellenborough* observed, "That all notices, on which rules are made, are process, in respect to the subject matter, not indeed process in respect to the writ, but process in respect to the rule." It is, in effect, a summons to the opposite party to appear in court, and defend himself against a rule to be applied for, and may, therefore, so far be regarded as process, and, consequently, within the general purview of the statute.

It would be highly unbecoming to allow persons, under all circumstances, and on any part of the *Sabbath*, the right to serve notices and papers in the progress of a suit. The right to serve, implies a duty to receive them; and, with respect to many persons, this might, and probably would, violate their religious feelings and principles. Such service must be inhibited wholly, or allowed under all circumstances; for it is impossible to regulate the practice. We think ourselves required by the statute, and the moral and religious sense of the community, to say, that no notice, which is to be the foundation of a rule, can be served on a *Sunday*, and we, therefore, deny the motion.

Motion denied.

(a) Vid. *Story v. Elliott*, 9 *Cow. Rep.* 27. So the suing a writ on *Sunday*, by defendant's endorsing his appearance. *Vanderpool v. Wright*, 1 *Cow. Rep.* 209, 210. note a.

ALBANY,
August, 1822*FREAR *against* EVERTSON.FREAR
v.
EVERTSON.

THIS was an action of *assumpsit*, tried at the *Dutchess* circuit, in *April*, 1821. The declaration contained the common counts for goods sold and delivered, money paid, &c. Plea, *non assumpsit*, with notice of a set-off, and of special matter to be given in evidence at the trial.

At the trial, the plaintiff proved his demand against the defendant, for goods sold and delivered to the defendant, amounting to 350 dollars and 99 cents. The defendant then offered to set off his demand against the plaintiff pursuant to the notice annexed to his plea, and produced a bill of the particulars, a copy of which had been served on the plaintiff. He then called a witness to prove, that the plaintiff, since the commencement of the present suit, had admitted and confessed that the items of the account, offered as a set-off by the defendant, were due to him from the plaintiff, as stated in the bill of particulars. The counsel for the plaintiff objected to the evidence, and to the admission of any confession from the plaintiff, on the ground that he had previously assigned his demand against the defendant. An assignment by deed was produced and proved, executed by the plaintiff, *Frear*, to one *A. G. Thompson*, dated the 29th of *May*, 1819, assigning to him, among other things, his claims and demands against the defendant, as security for a debt due from the plaintiff, *Frear*, to the said *Thompson*, who, after paying and satisfying the principal and interest due to him, out of the moneys to be collected by him from the debts so assigned, was to return the books of accounts, &c., to the plaintiff, *Frear*, and the assignment thereupon to be void. Notice of this assignment was given to the defendant, *Evertson*, soon after it was made. It was admitted that the demand of *Thompson* had not been satisfied, and that the present suit was brought by him, and prosecuted for his benefit. The judge overruled the evidence of the admission and confession of the plaintiff.

*The defendant then offered to call the plaintiff, to prove the account of the defendant, and that the same was due before the assignment was made, and before this suit was commenced; but the judge rejected the witness.

A verdict was taken for the amount of the plaintiff's account, being 350 dollars.

A motion was made to set aside the verdict, and for a new trial.

J. Tallmadge, for the defendant. He cited *Peake's Evid.* 149. (154.) 156. (162.) 1. *Phillips's Evid.* 57. *Steel v. Phoenix Ins. Co.* 3 *Binney's Rep.* 306. *McClenachan v. Scott*, 2 *Dallas's Rep.* 172. note. *McEwen v. Gibbs*, 4 *Dallas's Rep.* 137, *Dunn v. Simpson's Lessee*, 6 *Binney's Rep.* 178. 2 *Bay's Rep.* 93. *Norden v. Williamson*, 1 *Taunt.* 378. *Gilpin v. Vincent*, 9 *Johns. Rep.* 219.

Where the plaintiff had, previous to the suit, assigned his interest in the debt, or chose in action, of which the defendant had notice, evidence of confessions, subsequently made by him, as to the demands of the defendant against him, which might impair the interest so assigned, or prejudice the rights of the assignee, for whose benefit the suit was prosecuted, is inadmissible.

Nor can the plaintiff be a witness for the defendant, to prove the set-off, or demand of the defendant, in such a case.

A party to the record cannot be a witness, unless by consent of the real parties in interest. (a)

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CHAMBER-
LAIN

V.
GORHAM.

Stockham v. Jones, 10 Johns. Rep. 21, 22. *Bauerman v. Radenius*, 7 Term Rep. 663.

Oakley, contra. He cited *Phœnix v. Ingraham*, 5 Johns. Rep. 417—426. *Jackson*, ex dem. *Goodrich*, v. *Ogden*, 4 Johns. Rep. 140.

Per Curiam. The questions in this case are, 1. Whether the admissions of the plaintiff, after he had assigned his interest to another, could be given in evidence for the defendant, who had notice of the assignment. 2. Whether the plaintiff could be a witness for the defendant, when objected to by the plaintiff's counsel, after proving the assignment and notice.

The judge, at the trial, excluded the evidence, and rejected the witness; and we see no ground to doubt the correctness of his decision. Having assigned his interest in the *chose in action*, *Frear* could not impair that interest by any confessions made by him to the prejudice of his assignee. As to his being a witness, that he was a party to the record was enough to exclude him, unless by consent of the real parties in interest. But *F.* was not merely a nominal plaintiff. According to the terms of the assignment, there was contingent resulting benefit to him. The case of *Bauerman v. Radenius* (7 Term Rep. 663.) is clearly distinguishable from the present case. The plaintiff must have judgment.

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Judgment for the plaintiff.

CHAMBERLAIN against GORHAM.

A party in interest may be a witness to prove to the court the loss of the note, or instrument, on which the suit is brought, in order, to introduce proof to the jury of the contents of such note, or instrument. (a)

Where a note is not negotiable, the assignee takes it, subject to all the equity existing between the original parties at the time of the assignment.

A notice accompanying a plea of the general issue, ought to be so particular as to enable the plaintiff to come prepared to meet the facts stated in such notice.

(a) Vid. *Wilson v. Gale*, 4 Wendell's Rep. 623. *Jackson v. Vamil*, 7 Cow. Rep. 238. *Jackson v. Davis*, 5 Id. 123

note was assigned to him, soon after it was made, and that he gave notice of the transfer to the defendant, in *December*, 1816, and, in *January*, 1817, forbade him to pay the note to any other person. That soon after such notice, the witness transferred and delivered the note to *Jacob Fugleman*, in payment for a horse. The defendant objected to the evidence, on the ground, that the note, the existence of which was proved, varied from the one described in the plaintiff's declaration, as having been lost. *But the court decided that the evidence was admissible, under the money counts.

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The defendant then offered to prove, by way of defence, that when he gave the note in question, (which was for the price of land bought of the plaintiff,) the plaintiff gave him a covenant, that if there should appear to be any judgments, or *liens* on the land, the defendant might pay the amount of such encumbrances, and that such payments should operate to discharge and satisfy the note; and that, in fact, there were such judgments which bound the land; and that he had been obliged to pay, and had paid, more than the amount of the note, to redeem the land.

The plaintiff objected to this evidence: 1. Because, it could be no defence against the assignee, who was the real plaintiff, and who had given notice of the assignment, &c. 2. Because the evidence was not admissible under the notice subjoined to the plea of the general issue; which was, in general terms, that the defendant would prove that there were divers judgments, at the time of the sale of the land, &c., outstanding against the plaintiff, which were a *lien* on the land, &c.; and which the defendant was obliged to pay, and did pay, in order to prevent a sale of the premises, &c.; but without specifying any particular judgment, so as to enable the plaintiff to know in whose favor, at what time, and in what court, such judgments were obtained, so as to enable him to be prepared to prove that they were fraudulent, and had been reversed, or otherwise satisfied and vacated.

The court decided that the notice was defective, for want of such specification; and the evidence was, accordingly, rejected. The jury found a verdict for the plaintiff, for the amount of the note, on which the court rendered judgment.

On the return to the writ of error, the cause was submitted to the court without argument.

Per Curiam. There is no doubt that the party in interest may be allowed to testify to *the court*, upon the preliminary point, as to the loss of the note or instrument, *in order to introduce to the jury, parol evidence of its contents. (*Jackson v. Frier*, 16 *Johns. Rep.* 193.)

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The defence set up by the defendant, if proved, would, undoubtedly be valid, notwithstanding the assignment of the note, and notice of such assignment; for the note not being negotiable, the assignee must take it subject to all the equity existing at the time of the assignment and notice; and here, the equity or ground of defence was coeval with the date of the note. But the notice

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accompanying the plea was defective, for the reasons stated in the court below; and the judgment must, therefore, be affirmed.

Judgment affirmed.

ROBINSON *against* AMES, impleaded with ALLEN.

Where there are any funds of the drawer in the hands of the drawee, or if, at the time the bill is drawn, there are circumstances sufficient to induce a reasonable expectation that the bill will be accepted, or paid, the drawer is entitled to notice of its dishonor; and to due diligence [* 147] in the presentment of it.

As, where there were dealings, and an open account between the drawer and the drawee, and the latter had received considerable shipments of cotton from the drawer, and accepted previous bills, but on account of a fall in the price of the cotton, its value was not equal to the amount of the accepted bills, and the last bill drawn was, therefore, protested for want of funds: Held, that the drawer was entitled to notice; and notice, sent by mail, the next day after protest, was sufficient. (a)

Where a bill is drawn payable at sight, or

a certain number of days after sight, there is no fixed rule for its presentment; but the holder is bound to use due diligence, and put the bill into circulation.

THIS was an action of *assumpsit*, on a bill of exchange drawn by the defendants, merchants in *Augusta*, in the state of *Georgia*, on the 6th of *March*, 1819, upon *Townsend* and *White*, merchants, in the city of *New-York*, for five hundred dollars, payable sixty days after sight, to *Starr* and *Ross*, or order, by whom it was endorsed to the plaintiff. The cause was tried at the *New-York* sittings, in *June*, 1821, before the chief justice. The bill was presented for acceptance on the 20th of *May*, 1819, and notice of non-acceptance sent, by mail, on the next day, to the drawers, by a notary, directed to them at *Augusta*, in *Georgia*. On the 22d of *July*, 1819, the same notary presented the bill to the drawers for payment, which they refused, alleging the want of funds. Notice of non-payment was sent through the post-office, two or three days afterwards, *addressed to the defendants, at *Savannah*, in *Georgia*.

Townsend, one of the drawees, who was a witness for the plaintiff, testified, that on the 20th of *May*, 1819, the drawees had no funds in their hands belonging to the defendants, and had then accepted drafts to the amount of three or four thousand dollars more than they had funds of the defendants, and that this was the last bill drawn by them. That the want of funds proceeded from a fall in the price of cotton shipped by the defendants, to *T.* and *W.*; that, by an agreement between them, the defendants were authorized to make purchases of cotton, on the joint account of themselves and *T.* and *W.*, and to draw on *T.* and *W.* for the amount. That, on the 26th of *April*, 1819, *T.* and *W.* stopped payment. That after the 6th of *March*, and before the failure of *T.* and *W.*, they had received a considerable amount of cotton from the defendants, but had accepted the bills of the defendants to a larger amount than the value of the cotton so shipped, and the difference was owing to a loss on the cotton shipped; that, if the defendants were to pay all the bills, *T.* and *W.* would owe them five or six thousand dollars; but if *T.* and *W.* were to take up all the bills, the drawees would owe them three or four thousand dollars. It was proved, that the mail, which left *Augusta* about the 10th of *March*, was lost; and that the mail goes from that place to *New-York*, in ten days, and leaves the former place three times a week. That where bills are remitted by merchants, it is the usual course to send the bill by one mail, and to advise by the next.

A verdict was taken for the plaintiff, for five hundred and

(a) *Van Wart v. Smith*, 1 *Wendell's Rep.* 219. *Aymar v. Beers*, 7 *Cow. Rep.* 705. *Nichols v. Goldsmith*, *Wendell's Rep.* 160.

seventy-two dollars, subject to the opinion of the court on a case, as above stated.

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A. Tallmadge and *P. Ruggles*, for the plaintiff, contended, 1. That the bill, having been duly presented, and protested for non-acceptance, and notice thereof given, the action might be maintained, without showing a presentment for payment. A notice of non-acceptance is required to enable the drawer to draw his funds out of the hands of the *drawee. There is, then, no reason for requiring a notice of non-payment.

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2. That there was due notice of the non-acceptance of the bill, at least, *prima facie*; (*Miller v. Hackley*, 5 Johns. Rep. 375.) and it was not necessary for the plaintiff to aver or prove a protest for non-payment. (*Mason v. Franklin*, 3 Johns. Rep. 202. *Weldon v. Buck*, 4 Johns. Rep. 144. 5 Johns. Rep. 375.)

Buckley and *Slosson*, contra. 1. We admit the general rule, that where a drawer has *no funds* whatever in the hands of the drawee, he is not entitled to notice of the dishonor of his bill. The rule was first laid down in the case of *Bickerdike v. Bollmar*, (1 Term Rep. 405.) that a want of effects would excuse a want of notice. But the *English* judges have since expressed their regret, that the strict general rule was departed from, in that case; and it has been frequently decided since, that where there are dealings between the parties, and there is a fluctuating balance between them, or the drawer has reason to believe that he has, at the time, or that there will be, funds in the hands of the drawee, when the bill becomes due, he is entitled to notice of the dishonor of his bill. (*Legge v. Thorpe*, 12 East, 171. 2 Camp. N. P. Rep. 503. 3 Camp. N. P. 217. 334. *Brown v. Maffy*, 15 East, 216. *Rucker v. Hiller*, 16 East, 43.) And the principle of these decisions has been fully recognized by the Supreme Court of the *United States*, in the case of *French's Executrix v. The Bank of Columbia*, (4 Cranch, 141.) Here, there had been extensive dealings between the drawers and drawees, and an open account. The drawees went on accepting and paying bills down to the 25th of April, 1819; and it was owing merely to the fall in the price of the cotton, that the effects were not sufficient to pay the bill in question. There is not, then, the least ground to excuse a want of diligence, for want of funds. But Chief Justice *Marshall*, in the case in 4 Cranch, puts it on the ground of *fraud* in the drawer, in drawing bills, when he knows that he has not any funds at all in the hands of the drawee. And in *Claridge v. Dalton*, (4 Maule and Selw. Rep. 226, 230.) the rule in *Bickerdike v. Bollmar* is again mentioned, with regret, and confined to the case where the bill is drawn without any funds in the hands of the drawee, or any reasonable expectation, that, in the ordinary course of business, it would be accepted and paid.

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2. Then, was the bill presented in a reasonable time? The law on this subject is clearly laid down in the case of *Muiliman v. D'Eguino*, (2 H. Black. 565.) Chief Justice *Eyre* says, "What is reasonable time must depend on the particular circumstances of

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the case ; and it must always be for the jury to determine, whether any *laches* is imputable to the plaintiff." *Buller, J.*, says, the only rule that he knew of, applicable to all cases, was, that due diligence must be used. And that as to *laches*, in regard to bills payable at sight, or a certain time after sight, there was a further rule, namely, that the bill ought to be put into circulation. That as to *notice*, it was clearly sufficient to send it by the ordinary mode of conveyance. These rules have been frequently recognized. If the parties live in the same place, the bill ought to be presented the same day. If the parties entitled to notice live in another place, or abroad, it ought to be sent by the next or earliest conveyance. (2 *Taunt.* 287. 2 *Camp. N. P. Rep.* 537. 16 *East*, 248. 7 *Taunt.* 159. 397. *Chitty on Bills*, 200, 201. *Bayley on Bills*, 65. *Kyd on Bills*, 117.) Admitting that one mail was lost, yet the bill ought to have been sent by the next, or put into circulation the very first opportunity. There is no evidence that the bill was negotiated in due season ; nor is the delay sufficiently accounted for.

SPENCER, Ch. J., delivered the opinion of the court.

The questions in this case are, 1. Whether the bill was transmitted in due time ; and, 2. Whether the want of funds in the hands of the drawees, will excuse the delay in presenting the bill, or the irregularity in the notice of the non-payment of it.

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I am entirely satisfied that there is no foundation for saying, the defendants are precluded from setting up *laches*, because they had no right to draw the bill. The case of *Bickerdike v. Bollmar*, (1 *Term Rep.* 405.) is considered *the first case deciding that notice to the drawer of the dishonor of the bill was unnecessary ; and in that case the drawer had no funds, and knew he had none, in the hands of the drawee. The drawing the bill was considered a fraud, and it was held that he was not entitled to notice, and could not be injured by the want of it. It has, however, since that case, repeatedly been decided, that where there are any funds in the hands of the drawee, so that the drawer has a right to expect the bill will be paid, or where there are not any funds, yet if the bill was drawn under such circumstances as induced the drawer to entertain a reasonable expectation that the bill would be accepted and paid, the person so drawing it is entitled to notice ; and, *a fortiori*, he is entitled to have the bill duly presented. The rule is correctly laid down in *Claridge v. Dalton*, (4 *Maule and Selw.* 229.) by Lord *Ellenborough*. The principle which has been stated is very ably supported by Chief Justice *Marshall*, in *French v. The Bank of Columbia*, (4 *Cranch's Rep.* 153.) where the principal authorities are reviewed. There is nothing more important, than that, in questions of a general mercantile nature, there should be a uniformity of decision ; and, although the justice and equity of this rule may not, in some cases, be perceived, where the payee has purchased a bill, and it is drawn in good faith, and no conceivable loss has happened by the want of notice ; yet, as there may be cases where, though there were no funds in the hands of the drawee, the drawer may be injured by the want of notice, it is

better that the rule on the subject should be general and uniform throughout the mercantile world.

In the case of *Miller v. Hackley*, (5 Johns. Rep. 375.) *Weldon and Furiss v. Buck* and another, (4 Johns. Rep. 144.) and *Mason and Smedley v. Franklin*, (3 Johns. Rep. 202.) it was decided, that if a bill was presented for acceptance, and the drawee refused to accept it, and notice thereof was duly given, a demand of payment, and notice of a refusal to pay, was unnecessary, because the drawer was fixed already.

2. The only remaining question, then, is, whether there was *laches* in presenting the bill for acceptance; for there is no *doubt that regular notice was given of the refusal to accept the bill, the day subsequent to the demand. I do not find, that where a bill of exchange has been drawn payable at sight, or any specified number of days after sight, that there is any definite or fixed rule when the bill shall be presented for acceptance, other than this, that due diligence must be used. And it is certain, that with respect to such bills, and particularly where they are negotiated by the payee, there is much more latitude, as to the time of presentation, than where the bill has a fixed period of payment. In the case of *Muiliman v. D'Eguino*, (2 H. Bl. Rep. 565.) which is a very leading case on this subject, the judges felt the difficulty of saying at what time such a bill should be presented for payment. Ch. J. *Eyre* observed, that the courts had been very cautious in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance. He said, that if, instead of drawing their foreign bills payable at *usances*, in the old way, merchants chose, for their own convenience, to draw them in this manner, and to make the time commence when the holder pleases, he did not see how the courts could lay down any precise rule on the subject. But he thought the holder was bound to present the bill in a reasonable time, in order that the period might commence from which the payment was to take place; and that what was reasonable time must depend on the particular circumstances of the case. *Buller*, J., said, that he thought a rule might, thus far, be laid down as to *laches*, with regard to bills payable at sight, or a certain time after sight, namely, that they ought to be put in circulation. If they are circulated, he said, the parties are known to the world, and their credit is looked to; and if a bill, drawn at three days' sight, was kept out in that way for a year, he could not say there would be *laches*: but further than that, no rule could be laid down. *Heath*, J., observed that no rule could be laid down as to the time for presenting bills, payable at sight, or a given time after; that in the *French* ordinance of 1673, (*Postlethwaite's Dict. tit. Bills of Exchange*,) it is said, that a bill, payable at sight, or at will, is the same thing, and that this agreed with *Marius*.

*Now, here, the bill was put in circulation by *Ross* and *Starr*; and, although it is probable, that the first of exchange was lost, by the loss of the mail, we are not authorized to consider that as a fact in the case; but I cannot say, that upon such a bill there has been *laches*. We perceive how extremely cautious the judges

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were, in the case cited in laying down any rule. The evident inclination of their minds was, that when the payee put the bill in circulation, the subsequent holder was not bound to any strict presentment. The drawers of the bill evidently did not mean to limit the time of presentment, by making the bill payable at sixty days after sight. They meant to give a latitude, as to time, to the holder; and my conclusion is, that there is not such *laches* as will discharge the drawers.

Judgment for the plaintiff.

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*ANDRUS against WARING and others.

To a declaration in debt, on the penalty of a bond, executed to the plaintiff, as sheriff, conditioned that W. shall well and duly perform the office of a deputy sheriff, &c., and render a just and true account of all

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business that shall come to his hands, &c., *non damnificatus* is not a good plea: but

if it were, the defendant, after pleading such a plea, cannot rejoin, confessing and avoiding the action, for that would be a *departure*, and the rejoinder would be bad, on general demurrer. (a)

A rejoinder, in answer to a breach assigned in the replication, of negligence in W., the deputy, in the execution of process, &c., delivered to him, that he was removed by the plaintiff from his office of deputy, without alleging that such discharge was *under seal*, is bad.

So, where the breach assigned in the replication was, that the deputy, on the arrest of a defendant on *mesne* process, took a bail-bond, and that no appearance was entered, or special bail filed, and that the bail to the arrest was insolvent, and wholly insufficient, by reason whereof, the plaintiff was obliged to pay, &c.; a *rejoinder*, that the bail to the arrest had, at the time, sufficient in the county, to answer, and was good and responsible, is bad; for nothing can be a performance of the condition of the bail-bond, but putting in and perfecting special bail. And if the plaintiff, instead of demurring to such a rejoinder, surrejoins, that the bail taken was insolvent, and wholly insufficient, and through the negligence of the deputy, no special bail was filed, &c., taking issue thereon, such surrejoinder is not a *departure*, but is good on special demurrer.

So, where the breach assigned in the replication was, that after the bond was given to the plaintiff, and while W. was a deputy sheriff, a writ of *fi. fa.*, &c. was delivered to him, and by his negligence and default in not returning it, &c., the plaintiff was compelled, by attachment, to pay a large sum, &c. And the *rejoinder* alleged, that before the issuing of the *fi. fa.*, W. was removed by the plaintiff from his office of deputy; and that the writ did not come to the hands of W. until after he was removed; and the plaintiff *surrejoined* that the writ was committed to the care of W., as deputy, while he continued to exercise the duties of the office of deputy sheriff, and was a deputy under the plaintiff, tendering issue thereon: On a special demurrer, *held*, that the surrejoinder was good.

Where, to a similar breach assigned in the replication, the defendant *rejoined*, that the writ was delivered to W. previous to the execution of the bond to the plaintiff, and while W. was a deputy sheriff, by virtue of a previous appointment; and the plaintiff *surrejoined*, that the writ was delivered to W. while he was acting as deputy sheriff, and was a deputy sheriff under the plaintiff: On a special demurrer, *held*, that the surrejoinder was bad; it being evasive, and not answering the material allegations of the rejoinder, and tendering issue on an immaterial fact.

Where several defendants to an action of debt, have joined in pleas in bar, one of them cannot, afterwards, sever, and put in a plea, going to his personal discharge; as a discharge under the insolvent act.

A discharge, under the insolvent act, of a defendant, who had executed a bond as a surety for a deputy sheriff, is not a good plea in bar; as the amount of damages sustained, in consequence of the breaches of the condition of the bond, was not ascertained, or liquidated. (b)

(a) *McClure v. Erwin*, 3 Cow. Rep. 313 321.

(b) *Ranson v. Keyes*, 9 Cowen's Rep. 128.

and just account of all business that came to his hands, as a deputy sheriff ought to do, &c.; in consequence whereof, the plaintiff became liable to pay, and was obliged to pay, divers sums of money, to wit, 75 dollars and 68 cents, being the amount collected by *A. W.* as deputy sheriff, on a *ca. sa.* issued against *E. Clark*; and also 272 dollars, on an attachment issued out of this court against the plaintiff, as sheriff, &c., for not returning a writ of *fi. fa.* in favor of *Paul Cushman*, against *P. Seymour* and *R. P. Hayes*; and also 270 dollars and 38 cents, on three attachments against the plaintiff, as sheriff, for not returning three writs of *fi. fa.* issued out of this court, directed, &c.; in one of which, *B. Platt* was plaintiff, and *J. M. Wain*, defendant; another, at the suit of the same plaintiff, against *J. Cowan*; and another, at the suit of the same plaintiff, against *E. Ferrill*, defendant, &c. &c., stating various other breaches. The second assignment of breaches stated, that *A. W.*, while deputy sheriff, &c., received a *capias ad resp.* in favor of the *New-Hartford Manufacturing Society*, against *Elam Wilber*, by virtue of which, he arrested *E. W.*, and thereupon took a bail-bond, executed by *Warren Kent* and the said *E. W.*, conditioned for the appearance of the said *E. W.* at the return of the said writ, according to the rules and practice of the court, by filing special bail, &c.; that the said *Warren Kent* became insolvent, and no bail was filed, and no appearance entered, according to the tenor and effect of the bail-bond in the said suit, whereof the said *A. Waldo* had notice, &c.; by means whereof, the plaintiff was afterwards, to wit, on the twenty-second of *December*, 1818, at, &c., obliged to pay, and did then and there pay, the said *New-Hartford Manufacturing Society*, the amount of the damages and costs, claimed and ascertained to be due from the said *E. W.* to them, to wit, the sum of 124 dollars and 25 cents damages, and 97 dollars and 73 cents costs of the suit, and of an attachment issued against the plaintiff, as *sheriff; and also 6 dollars and 50 cents, fees to the coroner, on the said attachment; which said sums the plaintiff was compelled to pay, and did pay, in consequence of the negligence and default of the said *A. W.* in his office of deputy sheriff, in not well and duly performing his said office as deputy sheriff, in all things according to law, and in not rendering a just and true account of all business that came to his hands, &c. The *third* assignment of breaches stated, generally, that the plaintiff had been obliged to pay, and had paid, divers large sums of money, to wit, the sum of three thousand dollars, on, &c. at, &c., in consequence of the default of the said *A. W.* in his office as deputy sheriff, &c.

To these replications, the defendants put in six rejoinders. In the *first* rejoinder to the first replication, as to the several breaches therein assigned, the defendant said, that the plaintiff ought not, by reason, &c., to have or maintain his said action, &c., because, &c. the plaintiff did not become liable to pay, nor was obliged to pay, the said sums of money mentioned, &c. or any part thereof, in manner and form, &c.; and further, that the said writs in the said replication mentioned, &c. were not committed or intrusted to the care and direction of the said *A. W.* as deputy sheriff, &c.,

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while he exercised the said office, in manner and form, &c., *without this*, that the said several sums of money mentioned, &c. were collected and received by the said *A. W.* as such deputy sheriff, and while he exercised the said office, &c. &c.

Second rejoinder: as to the *fi. fa.* in favor of *P. Cushman*, against *Seymour* and *Hayes*, mentioned in the said first replication, the defendants say, that the plaintiff ought not, &c., because, they say, that after the making of the said bond or obligation, &c., and after the said *A. W.* had taken upon himself and exercised the office of deputy sheriff, and before the issuing of the said writ of *fi. fa.* &c., to wit, on the 15th of *January*, 1817, the said *A. W.* was duly removed from the said office of deputy sheriff, by the plaintiff, then being sheriff, &c.; of which removal, the said defendants then and there had notice, &c.; and further, that the said writ of *fi. fa.* &c. did not come into the hands of the said *A. W.* until after he, the said *A. W.*, was so removed *from his said office, to wit, on the 29th of *May*, 1817, with a verification, &c.

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Third rejoinder, as to so much of the *first* replication, as relates to the writs of *fi. fa.* in favor of *B. Pratt*, &c., the defendants say, that the plaintiff ought not to have and maintain his said action, &c. because, they say, that the said *A. W.*, long before the making of the said supposed bond, or writing obligatory, &c., to wit, on the 4th of *March*, 1815, to wit, at, &c., was a deputy sheriff, by and under the plaintiff, as sheriff of the county of *Jefferson*, and on that occasion *John Cowles*, *Miles Cooper* and *Morris Homan* became bail and sureties for him, to the plaintiff: and that the said *A. W.* continued in his said office of deputy sheriff until and after the execution of the said supposed bond, &c. in the declaration mentioned; and that the said writs of *fi. fa.*, &c. came to the hands of the said *A. W.*, as deputy sheriff, &c., before the making of the said bond, or writing obligatory, in the declaration mentioned, to wit, on the 9th of *August*, 1816; with a verification.

Fourth rejoinder, as to the residue of the first replication, &c., that after the making of the said bond, &c. mentioned in the declaration, the said *A. W.* did not refuse to render a just and true account for, and pay over to the plaintiff, and others, for whom he had collected and received money, amounting, in the whole, to a large sum, to wit, the sum of 3000 dollars, or any part thereof, in manner and form, &c.; nor did the said *A. W.* ever embezzle a large sum of money, to wit, the sum of 3000 dollars, belonging to the plaintiff, or any part thereof, which, by the said replication, is supposed that he, the said *A. W.*, received, by virtue of his office; nor did he, the said *A. W.*, refuse to render a just and true account to the plaintiff for the same, or any part thereof, in manner and form, &c.; and tendering issue to the country.

Fifth rejoinder, as to the second replication, alleging that *Warren Kent*, who executed the bail-bond, taken for the appearance of the said *Elam Wilber*, at the suit of the *New-Hartford Manufacturing Society*, according to the exigency of the said writ, had sufficient within the said county of *Jefferson*, to answer according to the

exigency of the said *writ, and was good and responsible ; of all which the plaintiff had notice ; and this the defendants were ready to verify, &c.

Sixth rejoinder to the third replication ; alleging that the plaintiff had not been obliged to pay the sum of 3000 dollars, or any part thereof, in consequence of any negligence or default of the said *A. W.*, in his office of deputy sheriff, &c. &c., and tendering an issue to the country.

The plaintiff *surrejoined*. *First*, to so much of the rejoinder of the defendants, whereof they put themselves on the country, the plaintiff joined issue. *Second*, to so much of the rejoinder to the first breach assigned in the replication, as related to the *fi. fa.* in favor of *P. Cushman* against *Seymour* and *Hayes*, the plaintiff said, that the writ of *fi. fa.* was intrusted to the care of the said *A. W.* while he continued to exercise the duties of the office of deputy sheriff under the plaintiff, being sheriff, &c. and this he prayed might be inquired of by the country. *Third*, as to so much of the rejoinder as related to the several writs of *fi. fa.* in favor of *B. Pratt*, the plaintiff alleged, that the said writs of *fi. fa.* were committed and confided to the said *A. W.* while he was acting as such deputy sheriff under the plaintiff, as sheriff, &c., and the moneys thereon levied and collected, were collected and received by the said *A. W.* while acting as such deputy, &c. after the execution of the said bond, or writing obligatory, in the plaintiff's declaration mentioned ; and this the plaintiff prayed might be inquired of by the country, &c. *Fourth*, as to the rejoinder to the second breach assigned in the replication, the plaintiff *surrejoined*, that *Warren Kent* was, and did become insolvent, and wholly insufficient ; and that, through the negligence and default of the said *A. W.*, no bail was filed in the said cause of the *New-Hartford Manufacturing Society* against *Elam Wilber* ; and this the plaintiff prayed might be inquired of by the country, &c.

The defendants *demurred* to the *second*, *third* and *fourth surrejoinders*, and assigned special causes of demurrer. *First*, because the *second* surrejoinder does not confess and avoid, or traverse and deny the facts alleged in the rejoinder, as to the *fi. fa.* in favor of *Cushman* against *Seymour* *and *Hayes* ; and, also, that it does not answer so much of the said rejoinder as it assumes to answer ; nor does it answer any of the facts stated in that part of the rejoinder, which it pretends to answer, or joins any issue thereon, which can be tried by the country ; and, also, that the plaintiff joins issue on an immaterial fact, and leaves unanswered the material facts, which ought to have been answered. *Second*, because the *third* surrejoinder does not confess and avoid, or traverse and deny, the facts alleged in the rejoinder, as relate to the several writs of *fi. fa.* in favor of *Benjamin Pratt* against *M'Wain*, *Cowan* and *Ferrill*, and in favor of *Elam Brown* against *A. Kilbourn*, &c. *Third*, because that the said *third* surrejoinder introduces new matter, to wit, in alleging that the moneys collected on the said executions, were collected and received by *A. W.*, after the execution of the said writing obligatory, mentioned in the declaration : and it concludes to the country, when it ought to have concluded with

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a verification, so as to give the defendants an opportunity to reply to such new matter. *Fourth*, because the *fourth* surrejoinder neither confesses and avoids, nor traverses and denies, the allegation in the rejoinder that *Warren Kent*, at the time he executed the bail-bond mentioned therein, had sufficient in the said county to answer according to the exigency of the writ therein mentioned, and was good and responsible, &c. *Fifth*, because the said *fourth* surrejoinder alleged that, through the default and negligence of the said *A. W.*, no bail was filed in the suit against *Elam Wilber*, which is a departure from the cause of action assigned in the *second* breach, or replication, of the plaintiff. *Sixth*, because the said *fourth* surrejoinder introduces new matter, and concludes to the country, when it should have concluded with a verification, &c.

The plaintiff joined in demurrer.

After all the defendants had rejoined, *Vaughan*, one of the defendants, severed, and interposed a separate rejoinder, alleging that after making the bond mentioned in the declaration, and after the supposed breaches of the condition were committed, and before the commencement of the present suit, to wit, on the 28th of *December*, 1818, he was duly discharged, under the act for giving relief in cases of insolvency, *as an insolvent debtor; setting forth his imprisonment, petition, &c., and that such proceedings were thereupon had, that by virtue of the act he was, on the 13th of *March*, 1819, discharged by the commissioner, and setting forth his discharge *verbatim*. To this rejoinder, the plaintiff demurred, and *Vaughan* joined in demurrer.

The demurrers were submitted to the court, without argument, on the points and authorities stated by the counsel.

W. D. Ford, for the plaintiff.

J. Butterfield, for the defendants.

WOODWORTH, J., delivered the opinion of the court.

This is an action of debt on the penalty of a bond, executed by the defendants to the plaintiff, as sheriff of the county of *Jefferson*, on the 20th of *August*, 1816.

The defendants all join in a plea: 1. Of *non est factum*. 2. After craving *oyer* of the condition of the bond, which is, "that if *Waldo* shall well and duly perform the office of deputy sheriff in all things according to law, and shall render a just and true account of all business that shall come into his hands, as a deputy sheriff ought to do, according to the best of his abilities, then the obligation to be void," they say, the plaintiff has not been damaged.

To the *second* plea, the plaintiff filed three replications, assigning breaches in each. The defendants joined in six rejoinders to the matters alleged in these replications; to which the plaintiff surrejoined, and tendered issues to the country. The defendants struck out the *similiter* to the 2d, 3d and 4th surrejoinders, and demurred specially; and the plaintiff joined in demurrer.

After the defendants had rejoined, the defendant, *Vaughan*, severed, and interposed a separate rejoinder, alleging, that since

the making of the bond, and since the committing of the supposed breaches, he had been duly discharged under the act for giving relief in cases of insolvency. The plaintiff demurred to this last rejoinder, and the defendant, *Vaughan*, joined.

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I will first examine whether this demurrer is well taken.

*The rejoinder by *Vaughan* is bad, because it is a departure from the plea in bar. After pleading that the plaintiff was not damnified, the defendant cannot rejoin confessing and avoiding the action. This position is supported by the uniform current of authority. (*Co. Lit.* 304. a. 2 *Wils.* 96. 4 *Term Rep.* 504. 2 *Caines*, 320. 3 *Johns. Rep.* 367. 16 *Johns. Rep.* 205.) Such departure is bad, in substance, and on general demurrer. (1 *Wils. Rep.* 122. 4 *Term Rep.* 504. 2 *Wils. Rep.* 96. 1 *Chitty's Pl.* 623. 2 *Saund.* 84. a. n. 1.) The last case corrects that part of note 3, to 1 *Saund.* 117, in which it is said, that since the statute of 4 and 5 *Anne*, ch. 16, a departure is matter of form, and good, unless specially demurred to.

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The rejoinder is, also, bad on other grounds. *Vaughan* having joined with the other defendants in the pleas in bar, and the first six rejoinders, has united his defence with theirs; and could not, afterwards, interpose a plea going to his personal discharge. (*Smith v. Bouchier et al.* 2 *Str.* 994. *Schermerhorn v. Tripp*, 2 *Caines*, 108.) In actions *ex contractu*, where there are several defendants, who join in their pleas, and a verdict is found against them, the plaintiff cannot enter a *nolle prosequi* against any of them, because, the contract being joint, the plaintiff is compellable to bring his action against all the parties; and he shall not, by entering a *nolle prosequi*, prevent the defendants, against whom the recovery has been had, from calling upon the other defendants for a ratable contribution. But if, in such actions, the defendants sever in their pleas, as where one pleads some plea, which goes to his personal discharge, and not to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others. (1 *Saund.* 207. n. 2.) The case of *Hartness v. Thompson* and others (5 *Johns. Rep.* 160.) is not opposed to this principle, but supports it. The action was on a joint and several promissory note; the defendants pleaded *non assumpsit*. At the trial, one of the defendants was permitted to prove infancy, and a verdict was taken in his favor, and for the plaintiff against the other defendants. This case was considered as falling within the reason of the distinction laid down in *Noke and Chiswell v. Ingham*, (1 *Wils.* 90.) *where it was held, that where an action is brought against several parties to a joint contract, and one pleads some plea, which goes to his personal discharge, and not to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others. It is true, in the case of *Hartness v. Thompson et al.* the defendants all joined in the plea; but it will be seen, that proof of *infancy* was proper under the general issue, and in such a case, it is the same as if infancy had been pleaded; and so Mr. Justice *Van Ness* seems to consider it. He observes, "When a suit is commenced against several joint debtors, upon a joint contract, and one of them pleads or gives in evidence a matter which is a bar to

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the action, as against him only, and of which the others cannot take advantage; as it respects them, there can be no good reason why the plaintiff should not be at liberty to proceed to take judgment against them."

If issue had been taken on this plea, and found for the defendant, judgment must have been against the plaintiff for the whole, because all the defendants having united in the other pleas, although the plaintiff should obtain a verdict on those issues, he could not have judgment; for *Vaughan*, having succeeded on the issue, which went to his personal discharge, judgment could not be rendered against him on the other issues; and, as we have seen, it would not be competent for the plaintiff to enter a *nolle prosequi* against *Vaughan*, in the state in which these pleadings are, as might have been done, had *Vaughan* relied solely on his discharge, and pleaded that singly. The plea is bad, on another ground, because the plaintiff's demand was not reduced to certainty, when *Vaughan* was discharged. The plea alleges, that after the committing of the supposed breaches by *Waldo*, *Vaughan* was discharged. It is true, *Waldo* had neglected to fulfil the condition of the bond, and *Andrus* was liable to the parties in the suits; but the amount was not liquidated; it was uncertain, and consequently he could not come in as a creditor under the assignment.

This is like the case of bail, who had become fixed, and judgment recovered against them on the recognizance; the principal was then discharged; after this, the bail paid the money, and thereupon brought an action against the principal; *and it was held, the debt was not made certain, until after the defendant's discharge. The debt must be certain and fixed at the time of the insolvent's assignment. (*Buel v. Gordon*, 6 *Johns. Rep.* 126. *Frost v. Carter*, 1 *Johns. Cas.* 73.)

On this demurrer, there must be judgment for the plaintiff.

The next inquiry will be as to the special demurrers taken by the defendants to the 2d, 3d and 4th surrejoinders of the plaintiff. It is an established rule, that, although the pleading demurred to be defective, the court will give judgment against the party whose pleading was first defective in substance. It is contended by the plaintiff's counsel, that the plea of *non damnificatus* is no answer to the declaration, and, therefore, void. If this be correct, it will be unnecessary to notice the subsequent pleadings.

It appears to be settled, that in all cases of conditions to indemnify and save harmless, the proper plea is *non damnificatus*; and if there be any damage, the plaintiff must reply it. (1 *Saund.* 117. n. 1. and the authorities there collected.) So, also, where all the matters to be performed are in the affirmative, it is sufficient for the defendant to plead a performance generally; and it must come from the other side to show a breach committed by the defendant. (2 *Saund.* 411. n. 3.) But where the condition of a bond consists of several particular things to be performed by the obligor, he cannot plead a general performance, but must set forth particularly, in his plea, how he hath performed each particular thing. (1 *Saund.* 117. 1 *Sid.* 215. 1 *Lev.* 303. *Cro. Jac.* 359.)

The bond, in this case, is not technically a bond of indemnity, although intended as such. The condition is to perform two things: first, well and duly to perform the office of deputy sheriff; and, second, to render a just and true account of all business that shall come into his hands, as a deputy sheriff ought to do. In *Words v. Rowan and Coon*, (5 Johns. Rep. 42.) the condition of the bond was, that *Rowan* should remain a true and faithful prisoner, and not depart or go without the limits of the gaol, until discharged by due course of law. The defendants pleaded, that the bond was made for the indemnity of the plaintiff, *and that the plaintiff had been indemnified by the defendants. To this plea, there was a general demurrer. The court held, that it was no answer to the action to say, that the plaintiff is not damnified, for the condition is to remain a faithful prisoner, and not depart the liberties; the moment he does so, the bond is broken, and a cause of action accrues on the penalty. How much the plaintiff shall recover, is a distinct question. The same answer may be given to the plea of the defendants. The bond is broken, if the deputy does not well and duly perform the office, or if he shall not render a just and true account; for this the plaintiff would be entitled to recover nominal damages, although he may not actually have been made liable by suit, or been obliged to satisfy the persons whose business had been neglected by *Waldo*, as deputy. It is sufficient that the plaintiff was entitled to judgment against the defendants for a non-performance of the condition. The plea of *non damnificatus* is, substantially, that the plaintiff has not been made liable to third persons for any neglect of *Waldo*; and, as the plaintiff's action is sustainable, without showing this, it follows, that the plea is bad, and no answer to the declaration; and, on that ground, being matter of substance, the plaintiff is entitled to judgment on the demurrers, to the 2d, 3d and 4th surrejoinders. (*Holmes v. Rhodes*, 1 Bos. and Pull. 638.)

But, admitting the plea to be good, the rejoinders preceding the demurrers taken by the defendants, are bad, being a departure from the plea in bar. A departure is defined to be, when a party quits one defence, which he has first made, and has recourse to another. It is when the second plea does not contain matter pursuant to the first, and does not support and fortify it. (*Co. Litt.* 304. a. 2 *Saund.* 84. n. 1.) It is also settled, that a departure in pleading is matter of substance, and bad upon general demurrer. (2 *Wi's.* 96. 1 *Wils.* 122. 4 *Term Rep.* 504. 2 *Saund.* 84. n. 1.)

The rejoinders fall within this definition; for the plea rests the defence on the ground that the plaintiff has not been damnified. The rejoinders set out facts which place the defence on a different ground; that is to say, admitting that the plaintiff has been damnified, yet he has no legal claim against the defendants to be indemnified. It is *confessing and avoiding the action, which is inadmissible. This view of the rejoinders, to which the plaintiff has surrejoined, and the defendants demurred, if correctly taken, disposes of the demurrers, however defective the surrejoinders may be. There are, however, other objections, which apply to the rejoinders, separately. The *second* rejoinder avers, that *Waldo* was

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removed from the office of deputy sheriff by the plaintiff, but does not allege that the discharge was under seal. I apprehend a discharge by parol would be a nullity; this was so decided in the case of *The People v. Andrus*, on an attachment, in May term, 1819.

In *Van Antwerp v. Stuart*, (8 Johns. Rep. 125.) in an action of debt, on an arbitration bond, the defendant pleaded no award. The plaintiff replied, that the defendant revoked the submission, but did not state, that the revocation was under seal. The plaintiff demurred generally; and the replication was held bad, in not stating the revocation to be under seal, and that the court could not intend it. (1 Saund. 291. n. 1.)

The rejoinder to the second replication is, that *Warren Kent* became bail, and executed a bail bond; that *Kent* had sufficient property at the time, within the county, to answer, and was good and responsible. The fourth surrejoinder answers this, and the defendants demur. I think the rejoinder bad, according to *Stevens v. Boyce and Daley*, (9 Johns. Rep. 292.) in which it was held, that on a bond to the sheriff to indemnify and save harmless, the defendant, by the bond, assumed every risk which the law attached to the execution of process, one of which was the continued responsibility of the bail to the arrest. This material averment is omitted. The plea does not aver, that special bail was put in and perfected. Nothing can be a performance of the condition of the bail-bond, but putting in and perfecting special bail. (5 Burr. 2683.) The bail-bond is for the indemnity of the sheriff. As nothing but putting in and perfecting special bail will answer the condition of the bail-bond, nothing else will excuse the sheriff. His deputy is answerable over to him in like manner. *Waldo*, therefore, is liable, there being no averment that special bail had been perfected.

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*In the next place, I will consider the surrejoinders of the plaintiff, to which the defendants have demurred specially. In the first replication, the plaintiff avers, that after making the bond, and while *Waldo* was deputy sheriff under the plaintiff, there was intrusted to him, as such deputy sheriff, a writ of *fi. fa.* in favor of *Paul Cushman* against *Polydore Seymour* and *Roswel P. Hayes*; and that, through the negligence and default of *Waldo*, in not duly returning the writ, the plaintiff had been forced to pay a large sum of money. The defendants rejoin, that before the issuing of the writ, on the 15th of January, 1817, *Waldo* was removed from the office of deputy by the plaintiff; that the writ of *fi. fa.* was tested on the 17th of May, 1817, and did not come to *Waldo's* hands until after he was removed, to wit, on the 29th of May, 1817. The plaintiff surrejoins, that the writ of *fi. fa.* was committed to the care and directions of *Waldo*, while he continued to exercise the duties of the office of deputy sheriff, and was deputy sheriff under the plaintiff. To this the defendants demurred specially, and assigned, among other things, for cause, that the plaintiff does not confess and avoid, or traverse and deny, the facts in the rejoinder set forth, but joins issue on an immaterial fact.

It appears to me, that the demurrer is not well taken; for the allegation in the rejoinder substantially is, that he was not a

deputy when he received the writ: if he had been removed from office, he was no longer a deputy. The surrejoinder puts in issue the fact; for it alleges that the *fi. fa.* was confided to *Waldo* while he was deputy sheriff under the plaintiff, and, therefore, concludes properly to the country. On the trial, it would be competent for the defendants to prove the fact, that *Waldo* had been removed previously; and, if made out, it would have entitled the defendants to a verdict on this issue. "A replication, at once denying the particular fact intended to be put in issue, and concluding to the country, without any preamble, and without a formal traverse, frequently occurs in practice, and, on account of its conciseness, should, when practicable, be adopted." (1 *Chit. Pl.* 592.) The same rule is recognized by Justice *Ashhurst*. (2 *Term Rep.* 442.) If a plea answers the matter which is the gist of the action, it is sufficient. (1 *Sound. Rep.* 28. note 3. 2 *Term Rep.* 297. 3 *Wils. Rep.* 20.) The fact on which issue is taken, is a material fact; and, if found for the defendants, would determine the merits of the cause.

Another breach in the replication is, that while *Waldo* was deputy sheriff under the plaintiff, there was intrusted to his care three writs of *fi. fa.* in favor of *Benjamin Pratt*, which, by reason of the negligence and default of *Waldo*, were not duly returned, and that attachments were issued against the plaintiff, as sheriff; by reason of which, he was obliged to pay a large sum of money, stating the amount: *Rejoinder*, that *Waldo* received the several writs of *fi. fa.* previous to the making the writing obligatory, and while *Waldo* was a deputy sheriff, by virtue of a previous appointment: *Surrejoinder*, that the writs were committed to *Waldo* while he was acting as deputy sheriff, and was deputy sheriff under the plaintiff, and that the moneys were collected by *Waldo* while acting as such deputy sheriff under the plaintiff, after the execution of the bond in the plaintiff's declaration: to this there is a special demurrer, setting out several causes. This demurrer is well taken. The bond does not extend to writs committed to *Waldo* previous to its execution, or to any acts of his in relation to such writs, subsequent to the execution of the bond. It is, and was intended to be, prospective. The surrejoinder does not answer a material allegation set out in the rejoinder, but evidently evades it, and sets out immaterial matters: in this, that *Waldo* was a deputy when he received the writs, and collected the money after the execution of the bond. This may be all true, but is no answer to the defence, which rests on the fact, that *Waldo* received the writs under a previous appointment, before the defendants became sureties. The plaintiff was bound to take issue on it; and not having done so, the defendants had cause of demurrer.

A further breach assigned in the replication is, that *Waldo* received a *capias ad respondendum*, issued out of this court, against *Elam Wilber* in favor of the *New-Hartford Manufacturing Society*, and arrested *Wilber*, and took a bail-bond, executed by *Warren Kent* and *Wilber*, conditioned for his appearance, according to the rules and practice of the court, by filing special bail; that *Kent* was and did become insolvent; that no bail was filed; by

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means whereof, the plaintiff was obliged to pay the amount ascertained to be due from *Wilber*, on an attachment: *Rejoinder*, that *Waldo* arrested *Wilber*, and took bail for his appearance; that *Warren Kent* became bail, and executed a bail-bond, and that *Kent* had sufficient at the time within the county, to answer according to the exigency of the writ, and was good and responsible: *Surrejoinder*, that *Warren Kent* was and did become insolvent, and wholly insufficient, and, through the negligence of *Waldo*, no bail was filed. To this surrejoinder the defendants *demurred* specially, because the plaintiff has not confessed or avoided the fact, that *Kent* had sufficient property, and was good; and because the plaintiff alleges, that, by the negligence of *Waldo*, no bail was filed, which is a departure from the cause of action assigned in the replication, and because it introduces new matter, and concludes to the country. The demurrer is not well taken. As to the first cause, it may be observed, that the allegation in the rejoinder, that *Kent*, at the time he executed the bail-bond, had sufficient, was irrelevant and immaterial; the plaintiff, therefore, properly took issue on the most material fact alleged; that is to say, that *Kent* was good and responsible, by averring that *Kent* was and did become insolvent, and was wholly insufficient, which corresponds with the allegation in the replication, and is not a departure. Although the plaintiff might have demurred for the insufficiency of the rejoinder in substance, he might elect to waive that, and take issue on the most material point alleged by the defendants, without giving cause for a special demurrer.

The residue of the surrejoinder, which is, that through the negligence and default of *Waldo*, no bail was filed, is not a departure; for it does not quit the ground taken in the replication, but supports and fortifies it; neither does it allege new matter which required a verification. The defendants allege this for special cause, but have not pointed out in what the new matter consists. It is not, therefore, well assigned. (2 Johns. Rep. 429.)

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*On a review of this case, I am of opinion, that the demurrers of the defendants to the *second* and *fourth surrejoinders* must be overruled, and that the demurrer to the *third surrejoinder* is well taken. But, as the *rejoinders* are bad in substance, and the plea of *non damnificatus* cannot be supported, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

HALLIDAY against MARTINET.

IN ERROR, to the Court of Common Pleas, or Mayor's Court, of the city of *New-York*.

Halliday brought an action of *assumpsit* against *Martinet*, in the court below, as endorser of two promissory notes; the one dated the 2d of *July*, 1814, at *New-York*, made by one *De Bruges*, for one hundred dollars, payable to the defendant, or order, sixty days after date; the other, of the same date, for the same sum;

The protest of a notary, deceased, and a register of protests, kept by him, in which were notes and memoranda in his hand-writing. proved by

payable to the defendant, four months after date. The declaration averred, that after the notes became due and payable, to wit, &c., "diligent search and inquiry was made after *De Bruges*, the maker, at the city of *New-York*, and elsewhere, to wit, at the place aforesaid, in order that the said note might be presented and shown to him, for payment thereof, but that he could not, on such search and inquiry, be found, nor did he then, or any time since, pay or cause to be paid the said sum of money, &c.; of all which premises, the defendant then and there had notice. By means whereof," &c. The declaration contained a count for goods sold and delivered, the usual money counts, and an *insimul computassent*. The defendant pleaded *non assumpsit*. At the trial of the cause, in *July*, 1820, *Thomas M'Lean* was called as a witness for the plaintiff, and testified, that on the third of *September*, 1814, and afterwards, he was a clerk to *William Bleecker*, who was the notary public to the *Manhattan Company*, and since deceased; and that the protests produced to the witness, being partly printed and partly written, were subscribed by the said *William Bleecker*, as public notary, and sealed with his notarial seal. The protests stated, that he, *W. B.*, the notary, "made inquiry for *De Bruges*, the maker of the said note, to demand payment, but could not find him." The plaintiff also gave in evidence "the register of protests," kept by *W. B.*, the notary, and which were identified and proved by the witness, entitled "*Manhattan Protests*." In this register were inserted copies of the notes and protests, with memoranda or remarks, to wit, to the first protest, "5. Put notice in P. Off. for *P. L. Martinet*, and also left one for him at *Robert Halliday's* the holder. *T. M'Lean*." The witness stated, that this memorandum was in the hand-writing of the notary, and the signature in the hand-writing of the witness. That he had no particular recollection of the transaction; but from seeing his signature to the memorandum, and from the course of business in the office, he has no doubt that he put a notice, in the usual form, in the post-office, for the defendant, but how the same was directed he did not know; and that he left one with the plaintiff. The witness presumed, that the inquiry for the maker was made by *W. B.*, the notary, as there were no initials or other memorandum made on the protest, to denote that such inquiry was made by another person; but he did not know that any inquiry was made. That it was the custom of the office of *W. B.* to leave notice at the residence of the endorser, if they could learn where it was, and if they could not discover it, to put a notice for him in the post-office, and also to leave one for him at the holder's. That, from the course of business in the office, the witness had no doubt but the inquiry was made for the residence of the defendant, and that the same could not be ascertained; but he could not say whether such inquiry was made by *W. B.*, or the witness, or any other person. To the second protest in the register of the notary, was subjoined the following: "*W. B.*" "Remarks." "7. Left

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a witness, stated that the notary had made diligent search and inquiry after the maker of a note, in the city of *New-York*, (where the note was dated,) in order to demand pay

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ment of him, and that he could not be found, &c., and that notice of non-payment, for the endorser, was put in the post-office: *Held*, that this was sufficient evidence of due diligence as to the demand of payment of the maker of the note, but not of a notice to the endorser, as the note or memorandum, in the register of the notary, did not state where the endorser resided, nor to what place the notice to him was directed. But, it seems, that if the notary had stated; that the endorser, after diligent search and inquiry, could not be found, that would have been sufficient to entitle the plaintiff to recover against the endorser (a)

(a) Vid. *Wright v. Butler*, 6 *Wendell's Rep.* 281. *Butler v. Wright*, 2 *Ibid.* 369. *Heart v. Wilson*, *Ibid.* 513. *Wilber v. Selden*, 6 *Cow. Rep.* 162. *Nichols v. Goldsmith*, 7 *Wendell's Rep.* 160.

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notice for *P. L. Martinet*, at *R. *Halliday's*. Noticed holder, *A. W. B.* "7. Put notice for *Martinet* in post-office. *W. B.*" *A. W. Bleecker*, who was examined as a witness for the plaintiff, testified, that he was the son of *W. B.*, the notary, deceased, and that, on the 7th of *November*, and before and afterwards, acted as his clerk. That the initials *W. B.*, in the margin, were in the hand-writing of the said *W. B.*, deceased; and the witness, therefore, supposed, that the inquiry for the maker of the note was made by the said *W. B.* That the "remarks," or *memoranda*, and the initials *W. B.*, are, also, in the hand-writing of the said *W. B.*, and that the initials *A. W. B.*, subscribed to one of them, were written by the witness at the time. That the witness had no recollection of this particular transaction; but, from seeing his initials to the memorandum, he had no doubt that he left the usual notice for the defendant at the plaintiff's; and noticed the holder of the note, as stated in the memorandum. That it was the custom of the office to leave a notice at the residence of the endorser, if they could learn where it was; and if they could not discover it, to put a notice for him in the post-office, and, also, to leave one at the holder's. That, from the course of business at the office, the witness had no doubt but that inquiry was made for the residence of the defendant, and that the same could not be ascertained. But the witness could not say, whether such inquiry was made, and, if made, whether it was made by *W. B.*, or by the witness, or by any other person. The counsel for the plaintiff, also, offered in evidence a book, entitled "*Longworth's American Almanac, New-York Register, and City Directory*," commencing on the 4th of *July*, 1814; by which it appeared, that the 4th of *September* and the 6th of *November*, in that year, were Sundays; and the counsel offered the "directory" part of the book to show, that neither the names nor places of abode of *De Bruges*, the maker, and *Martinet*, the defendant, were inserted therein; but the recorder refused to permit the book to be read in evidence for that purpose. *P. M. Stollenwerck*, a witness for the plaintiff, testified, that the defendant, in 1814, had not any family, nor any house, shop, counting-room, or office, in the city of *New-York*; and was an apprentice to Messrs. *Stollenwerck *and Brothers*, jewellers in *New-York*, and had been for the greater part of the time absent from the city, being employed by them to go to the southward to vend merchandise. When he returned to *New-York*, he staid no longer than was sufficient to settle his accounts, and was sent again with a new supply of merchandise to the southward, as before. That when he was in the city, he usually staid at the house and store of the said *S. and Brothers*. The witness could not say whether or not the defendant was in the city on the 5th of *September* and the 7th of *November*, 1814.

The counsel for the defendant insisted, that the evidence produced by the plaintiff was not sufficient to entitle him to go to a jury, and moved for a nonsuit; and the recorder, being of that opinion, directed the plaintiff to be called and nonsuited. The plaintiff's counsel excepted to the opinion of the recorder, and

tendered a bill of exceptions, &c., on which the writ of error was brought returnable to this court.

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G. Griffin, for the plaintiff in error, contended, 1. That the *City Directory* was evidence, for the purpose of showing that the defendant had no fixed house, office, or domicil, in the city of *New-York*

2. That the evidence of *notice* to the defendant, as endorser of the note, was sufficient. The circumstances of the case were a little peculiar, perhaps, and it might not, therefore, be easy to find any adjudged case, precisely in point; but there were several cases very analogous, and the principle on which they were decided would be found applicable to the present. He cited *Welsh v. Barrett*, 15 *Mass. Rep.* 380. *Pritt v. Fairclough*, 8 *Camp. N. P. Rep.* 305. *Hagedon v. Reid*, *Id.* 379. note. *Price v. Torrington*, 1 *Salk.* 285. *Pitman v. Maddox*, 2 *Salk.* 690. *Bateman v. Joseph*, 2 *Camp. N. P. Rep.* 461. *Chapman v. Lipscombe*, 1 *Johns. Rep.* 294. *Miller v. Hackley*, 5 *Johns. Rep.* 375.

3. But whether due notice or not, was a question of fact, which ought to have been left to the jury.

Anthon, contra, said, that in *Welsh v. Barrett*, there was much stronger evidence of the duty of the officer having *been performed, than in the present case. After the plaintiff had proved that the defendant was in the employ of Messrs. *Stollenwerck and Brothers*, and that his place of business was at their shop, he ought, at least, to have proved that notice had been left there. It does not appear whether the notice put into the post-office was directed to any particular place, or out of the city. (*Anderson v. Drake*, 14 *Johns. Rep.* 114.)

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WOODWORTH, J., delivered the opinion of the court.

This is a writ of error to the Mayor's Court of *New-York*. On the trial, the recorder directed a nonsuit, on the ground that the evidence offered by the plaintiff was not sufficient to support the issue.

The first question is, whether due diligence has been used to demand payment of the maker. If it has, then, whether there is competent evidence to charge the endorser.

The notes were protested in 1814, by *William Bleecker*, a notary, now deceased. The protest states, that he went with the original notes, and made inquiry for *De Bruges*, the maker, in order to demand payment; but he could not find him. The notes are dated in *New-York*, and there is no evidence that the maker resided elsewhere. If the notary had been living, and testified to the facts contained in the protest, it would have been, *prima facie*, sufficient to show reasonable diligence to demand payment of the maker. (*Stewart v. Eden*, 2 *Caines's Rep.* 121.) In *Welsh v. Barrett*, (15 *Mass. Rep.* 380.) the question was fully discussed, whether the book of the messenger of a bank, who was dead, in which, in the course of his duty, he entered memoranda of demands

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and notices, could be received in evidence of a demand on the maker, and notice to the endorser. The court admitted the evidence, considering the principle as founded in good sense and public convenience. "What a man has said, when not under oath, may not, in general, be given in evidence, when he is dead; because his words may have been misconstrued, or misrecalled, as well as because it cannot be known that he was under any strong motive to declare the truth. But what a man has actually done, and committed to writing, when under obligation to *do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of a jury."

In *Price v. The Earl of Torrington*, (1 Salk. 285.) the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which the clerk set down in a book kept for that purpose, to which the draymen set their hands; and that the drayman was dead, but that this was his hand set to the book; this was held good evidence of a delivery. In *Pitman v. Maddox*, (2 Salk. 690.) Holt, Chief Justice, allowed a shop book for evidence, on proof of the servant's hand, who made the entries, and that he was dead, and that he was accustomed to make the entries; no proof was required of the delivery of the goods. So, also, in *Pritt v. Fairclough*, (3 Camp. N. P. Rep. 305.) it was held, that an entry by a deceased clerk of the plaintiff, in a letter book, was admissible evidence, under the circumstances of that case, of the contents of a letter. Lord Ellenborough, on that occasion, observes, "The rules of evidence must expand according to the exigencies of society." In 3 Camp. N. P. Rep. 379. the same doctrine is recognized. The entry of the deceased clerk of a merchant, in the letter book, was received in evidence, on proof that it was made in the usual course of business, in the merchant's counting-house. I am satisfied, on principle and authority, that the evidence was competent, and that there was due diligence to demand payment of the maker.

The *New-York Directory*, by Longworth, was offered in evidence, to prove that neither the name of the maker nor endorser was inserted therein. This was properly overruled. If it was evidence, it only proved that neither the maker nor endorser rented or occupied a house; they might have been residents, and lodged in the city, notwithstanding. It did not establish the fact necessary to be made out; but it was not evidence. For aught that appears, Longworth was living, and might have been called. If he was dead, it would not fall within the rule, which I have already considered.

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*The question, whether sufficient evidence was given to charge the endorser, is attended with more difficulty.

When the holder of a bill does not know where the endorser is to be found, he does not lose his remedy, by not communicating immediate notice of the dishonor of the bill. If he uses reasonable diligence to discover the residence of the endorser, notice given as

soon as it is discovered, is due notice of the dishonor of the bill, within the usage and custom of merchants. (*Bateman v. Joseph*, 2 *Camp. N. P. Rep.* 461.)

In *Chapman v. Lipscombe*, (1 *Johns. Rep.* 294.) the bill was drawn and dated at *New-York*; there was no evidence that the plaintiff knew that the defendants resided at *Petersburgh*. He inquired at the banks, and elsewhere, and being informed that the drawers resided at *Norfolk*, he sent a notice, by post, to them, and another addressed to them at *New-York*. This was held sufficient, and all that ought to be required.

The evidence for the plaintiff did not bring his case within the principle of these decisions. The book entitled "*Manhattan Protests*," being the register of protests kept by *Bleecker*, contained memoranda, or remarks, at the foot; at the bottom of one of the protests there are the following words, in the hand-writing of *Bleecker*: "Put notice for *Martinet* in post-office. *W. B.*" Also, the words, "Left notice for *P. L. Martinet* at *R. Halliday's*. Noticed holder. *A. W. B.*"

Anthony W. Bleecker, a witness, says, that the last initials were written by him at the time; that he has no recollection of the transaction, but has no doubt he left the notice as stated; that it was the custom of the office to leave notice at the residence of the endorser, if they could learn where it was; and, if they could not discover it, to put a notice in the post-office. He has no doubt that such inquiry was made; but he could not say, whether it was made by any person. This evidence does not prove that the endorser lived in *New-York*, or that he could not be found, or to what place the notice in the post-office was directed. It only proves, what had been the practice of the notary's office heretofore. In the present instance, to allow this to establish the fact, that the endorser could not be found, we must *substitute conjecture and opinion for evidence. The fact, then, is not made out by this witness; and *William Bleecker's* memorandum goes no further than that notice was put in the post-office.

The remarks at the foot of the other protest, subscribed by *M'Lean*, states, that notice was put in the post-office for *Martinet*; but the witness does not know how it was directed. He states, that it was the custom of the office to leave notice at the residence of the endorser, if they could learn where it was, and if they could not discover it, to put a notice for him in the post-office; and he has no doubt inquiry was made for the residence of *Martinet*, and that it could not be ascertained; but he cannot say, that such inquiry was made by *Bleecker*, the witness, or any other person.

Stollenwerck proves no material fact. He says, that in 1814, *Martinet* had no family, nor any house or shop, in *New-York*, and that he had been the greater part of his time absent from the city, having been employed to go to the southward with merchandise to dispose of; that when he returned to *New-York*, he remained a sufficient time to settle his accounts, and until he was sent with a new supply; and when in the city, he staid at, and transacted his business in the house and shop of *Stollenwerck and Brothers*. If inquiry had been made, and particularly of this witness, the

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holder might have gained information where to direct a notice, if the endorser was not then in *New-York*. It remains wholly uncertain, whether diligent inquiry was made for the endorser, and that he could not be found; and whether he resided in the city of *New-York*, or at what other place. The notice in the post-office was a nullity, unless it appeared that he resided at some place other than *New-York*; and if he did, then it should appear that the notice was directed to him at such place. If the holder of the note has done all that a diligent and prudent man could naturally and fairly do, under the circumstances, we should be satisfied, and require no more. If the notary had stated, that the endorser could not be found, as he has done with respect to the maker, he would have made out sufficient to entitle the plaintiff to recover; but to charge a party on a contract *which is conditional in its nature, and creates no liability until certain precedent acts are performed, by merely proving the general practice of the office in other cases, accompanied by the opinion of a witness, not resting on any recollection or knowledge, but manifestly derived from such usual practice only, would, in my judgment, be dangerous and unjust. There could be no security in the administration of justice, if such an innovation on the rules of evidence should receive the sanction of our courts. We are, therefore, of opinion, that the recorder decided correctly, and that the judgment of the court below ought to be affirmed.

Judgment affirmed

R. & W. GOWAN against J. JACKSON.

A bill of exchange, drawn in *Antigua*, upon merchants in *London*, dated *July 18, 1817*, was not presented for acceptance until *January 16, 1818*; but it had been put into circulation, and had passed into several hands, before it was endorsed to the plaintiffs: *Held*, that under the circumstances,

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there was no laches in the holders, in presenting the bill.

THIS was an action of *assumpsit*, brought by the plaintiffs, as endorsees, against the defendant, as drawer of a bill of exchange. The bill was dated *Antigua, July 18, 1817*, for £381 16s. 2½d. sterling, on Messrs. *Jackson and Brothers, London*, payable ninety days after sight, to *Hugh Mackay*, or order, and endorsed by him, *Robert M'Nish, jun.* and by *George M'Nish & Co.*

At the trial, before Mr. Justice *Van Ness*, at the *New-York* Sittings, in *November, 1820*, the plaintiffs gave in evidence a protest for non-acceptance, dated *16th January, 1818*, and a protest for non-payment, dated *April 14, 1818*.

The defendant's counsel objected to the protests, that they were made after such a length of time, as to show laches on the part of the holders of the bill; and they proved that packets went regularly from *Antigua* to *London*, once *in every month, or forty days; but the judge overruled the objection.

To excuse the want of proof of notice of the dishonor of the bill,

Where the drawer of a bill is a partner of the house or firm on which it is drawn, it is not necessary for the holder to prove, that notice of its dishonor was given to the drawer.

Where the witness, a commission merchant in *New-York*, testified, that he became acquainted with and did much business for a merchant of *Antigua*, and understood, in the course of his business, and from general report, that he was a partner in a firm in *London*, on whom he had drawn a bill of exchange, though the witness had not known or heard of the drawer, or of the drawees, until more than six months after the bill was drawn: *Held*, that this evidence was sufficient, *prima facie*, to show that the drawer was a partner in such firm.

the plaintiffs offered to prove that the defendant was one of the firm of *Jackson and Brothers*. The defendant's counsel objected to the admissibility of the evidence, on the ground that the defendant might have separate funds in the partnership concern, if there was one, so as to be entitled to notice, as much as any third person; but the judge overruled the objection. *M.*, a witness for the plaintiffs, testified, that he had been acquainted with the defendant since the autumn of 1817, and, being a commission merchant, had done a good deal of business for him; and that he had always understood that the two persons connected under the firm of *Jackson and Brothers* of *London*, were *Joseph Jackson*, the defendant, and *Daniel Jackson*; and that the firm here was *Joseph Jackson*, or *Joseph Jackson & Co.*, but which, he did not recollect. That he understood from common report, that the defendant was a partner of the firm of *Jackson and Brothers*, in *London*; and that he had so understood in the course of his business, and in the settlements of accounts made by him with the defendant. The witness further stated, that he did not recollect that the defendant had ever mentioned to him that he was a partner of that house. That at the time the bill was drawn, he did not know the defendant, nor the firm of *Jackson and Brothers*, nor did he hear of them until more than six months after, or as late as *February* or *May*, 1818; and that all that he had heard relative to a partnership between them, was subsequent to that time.

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The jury found a verdict for the plaintiffs, for 2084 dollars and 10 cents.

H. & R. Sedgwick, for the plaintiffs. They cited 1 *Camp. N. P. Rep.* 82. 1 *Caines's Rep.* 184. *Whitney v. Sterling*, 14 *Johns. Rep.* 215.

T. A. Emmet and *Fay*, contra. They cited *Chitty on Bills*, 138. 2 *H. Bl.* 569. 4 *Cranch*, 141.

*SPENCER, Ch. J., delivered the opinion of the court. The first point arising in this cause, as to the *delay* in presenting the bill for acceptance, was fully discussed and considered in the case of *Robinson v. Ames*.† This is also a foreign bill, and was payable ninety days after sight, dated *July* 18, 1817, and presented for acceptance the 16th *January*, 1818; and it had been circulated and passed through several hands. For the reasons given in the case of *Robinson v. Ames*, we are of opinion, that there was no *laches* in presenting the bill. [* 178].

† Ante, p. 146

The next point made by the defendant's counsel is, that the evidence to show that the defendant was a partner of the house of *Jackson and Brothers*, the drawees, did not make out the fact, either that the defendant was a partner, or that he was a partner when the bill was drawn.

The only witness, to prove the partnership, was *P. S. Mills*; and he never heard or knew that there were such persons as the defendant and *Jackson and Brothers*, until *February* or *May*, 1818. Subsequent to these periods, *Mills* had done a good deal of busi-

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ness for the defendant, and had sold goods to a large amount by his orders. He had always understood there were two brothers connected in the business, the defendant and *Daniel Jackson*, and that the firm in *London* was *Jackson and Brothers*, and the firm here was either *Joseph Jackson*, or *Joseph Jackson & Co.*; and which, the witness did not recollect. And the witness had understood, from common report, that the defendant was a partner of the firm of *Jackson and Brothers*, in *London*. This is the substance of the evidence. When it is considered, that the bill was drawn in *Antigua*, and that there is no evidence of the defendant having done business in this country prior to the time spoken of by *Mills*, I think the evidence sufficient, *prima facie*; and that it was thrown on the defendant to show the commencement of the partnership, if it began at a time subsequent to drawing the bill. The interval between drawing the bill, and the period spoken of by the witness, when by common reputation they were partners, was so short, as to render it improbable that the partnership commenced posterior to drawing the bill.

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Considering it, then, as established, that the partnership *existed when the bill was drawn and presented, the question arises, whether notice of non-acceptance was required to be given to the defendant. It was proved, that the bill was presented for payment on the 16th of *January*, 1818, and was then protested for non-acceptance; and it was presented on the 16th of *April*, 1818, for payment, and protested. In the absence of all other proof, the bill must be considered as drawn by one partner of the firm, on the firm itself, in relation to the partnership business: and if so, then a knowledge by one of the firm of the dishonor of the bill, is, in point of law, knowledge by the whole firm. *Daniel Jackson*, the partner in *London*, had notice that the bill was refused acceptance and payment, for he was the person who thus refused. In *Porthouse v. Parker and others*, (1 *Camp. N. P.* 82.) Lord *Ellenborough* held, that where a bill had been accepted by one of the defendants, this was sufficient evidence of its having been regularly drawn; and that, the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove, that the defendants had received express notice of the dishonor of the bill, as this must necessarily have been known to one of them, and the knowledge of one was the knowledge of all. This is a very just and reasonable principle; for although *Joseph Jackson* is alone sued on the bill, yet, as has been already observed, it must be deemed a partnership transaction; and a knowledge by one of the firm of the dishonor of the bill, was all that ought to be required.

Judgment for the plaintiffs

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*JACKSON, *ex dem.* MYERS, against ELSWORTH.

EJECTMENT for the non-payment of rent, tried at the *Columbia* circuit, in *November*, 1821, before Mr. Justice *Van Ness*. The premises in question were demised, on the 1st of *November*, 1797, by *Robert R. Livingston*, since deceased, to the lessor of the plaintiff, for his natural life, and the life of his wife, reserving an annual rent of 82 dollars. The lease contained a clause, or covenant, that in case the rent should be in arrear and unpaid, for twenty days, next after the same should become due; or if the lessee, his heirs or assigns, shall not take possession and improve the premises demised, within six months after the date of the lease; or shall leave the possession, for the space of six months; or shall not keep and perform the several covenants and agreements expressed in the lease, &c., that then, and in either case, the lease, &c. was to be void, &c.; and that, thereupon, it should be lawful for the lessor, his heirs or assigns, to reënter, &c. The lessor of the plaintiff entered into possession immediately after the lease, and continued in possession until the winter or spring of 1810; and it was proved, that the defendant was now in possession of the premises, and that the lessor of the plaintiff and his wife were living.

The defendant proved, that the lessor of the plaintiff, having left the premises, *Livingston*, the landlord, entered into possession thereof, and continued in possession, until the first of *April*, 1812; and that the lessor of the plaintiff was indebted to *Livingston*, the landlord, for rent then due, 107 dollars and 72 cents, for which he gave his note, as in full, for rent up to the first of *May*, 1809. The defendant also proved, that the lessor of the plaintiff, since he left the possession, acknowledged that the note was due and unpaid, *and that the rent, from the first of *May*, 1809, to the first of *May*, 1810, was also due and unpaid. The defendant also gave in evidence a lease from *Livingston* to him, for certain lands, including the premises in question, dated *April* 18, 1811, for the lives of the wife of the defendant and of his son *George*; and that he entered on the premises, and has ever since continued in possession thereof, by virtue of that lease.

A verdict was taken for the plaintiff, subject to the opinion of the court on a case containing the facts above stated.

Vanderpoel, for the plaintiff.

Shufeldt, for the defendant.

WOODWORTH, J., delivered the opinion of the court.

The first question arising in this case is, whether the lapse of time will warrant the presumption that *Livingston*, the landlord,

was not to be presumed, unless, after a possession for, at least, fourteen years: and, admitting that the landlord entered six months after his tenant had quitted the possession, that, alone, would not divest the apparent right of possession gained by the tenant. (a)

(a) *Baldwin v. Munn*, 2 *Wendell's Rep.* 399

A lease for lives contained a clause of re-entry for non-payment of rent; or if the lessee should leave the possession for six months, or not perform the covenants, &c. The tenant left the premises in 1810, and the landlord, in *April*, 1811, executed another lease to the defendant, who entered and took possession of the premises, and the first lessee who had paid no rent to his landlord after the first of *May*, 1809, brought an action of ejectment, in 1821, against the defendant, to recover the possession: *Held*, that the right of the tenant, (the first lessee,) could be barred only by

[* 181] a recovery, in ejectment, under the statute; and that, if a legal reentry was to be presumed, it would be a reentry under the statute, rather than at common law; but that in the absence of any record, or evidence of a re-entry and recovery, by ejectment, under the statute, such reentry could not be presumed, and that a reentry at common law

that the landlord

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made a regular reëntry for non-payment of rent. It appears that *Myers*, the plaintiff, who was tenant for life, left the premises in 1810, and thereupon *Livingston* entered, and afterwards, on the 18th of *April*, 1811, executed a lease to the defendant, during the lives of his wife and son, by virtue of which lease the defendant entered, and is now in possession. The present action was commenced ten years and a few months after the plaintiff left the possession, and rent has been paid by him since *May* 1, 1809.

It is well settled, that the right of the tenant can only be barred by ejectment, under the statute. A reëntry at common law does not defeat the title in equity. (1 *N. R. L.* 440. 1 *Saund.* 287. 3 *Black. Com.* 175.) It is, however, sufficient for the defendant, if a reëntry in either way can be presumed, for then he holds the possession rightfully, as against the plaintiff.

If a legal reëntry has been made, it may be presumed to have been under the statute, rather than at common law, which was attended with great inconvenience, and many niceties. After the landlord has performed the requisites required by the common law, to entitle him to reënter, *resort must be had to an ejectment to obtain the actual possession, which, when obtained, is always uncertain, from its remaining in the power of the tenant to offer a compensation at any time, in order to found an application for relief in equity. (1 *Saund.* 287. note. *Woodfall*, 270.)

If the landlord has reëntered, he has undoubtedly chosen the more simple and efficient remedy under the statute. In applying the doctrine of presumption to such a case, I am not inclined to go further than the court has already gone; for it cannot be questioned, that if a reëntry had been made under the statute, the evidence of it exists as matter of record, and might have been produced. The non-production of it raises a presumption that there is no such evidence, at least, until search has been made, and some fact established, on which the presumption can rest. It appears to me much more probable, from the facts stated, that the landlord, finding the premises vacant, and rent being in arrear, concluded to take possession, without having recourse to the process of law.

In *Jackson*, ex dem. *Goose*, v. *Demarest*, (2 *Caines's Rep.* 382.) the court say, "After 14 years' possession, we will presume a regular reëntry at common law, reëntry is matter in pais, and not of record." In that case, which is the shortest period that has been deemed sufficient, the court do not rest the presumption on a reëntry, by ejectment under the statute, but at common law, evidently, because no presumption of the former could be indulged, so long as the record of recovery was not produced, or some cause assigned for its non-production. Considering that this principle operates in derogation of the grant, I apprehend our courts have been sufficiently liberal; and that a shorter period, if sanctioned, would frequently be productive of manifest injustice. In *Jackson* v. *Walsh*, (3 *Johns. Rep.* 226.) nine years was held insufficient. The presumption relied on would derive but little support from an additional year. I am of opinion, that the lapse of time is not sufficient to raise a presumption of a reëntry

for non-payment of rent, either at common law, or under the statute.

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*But it is urged, that the landlord had a right to enter and take possession, because the tenant left the premises. The clause in the lease is, if the tenant shall "*leave the possession for the space of six months.*" The right to enter did not accrue until six months after the lessor had quit; an entry before cannot be supported on the ground of a condition broken. The case states, "that upon the lessor of the plaintiff leaving the premises, the landlord *entered upon the possession.*" These expressions imply, that the entry was immediate, and before the expiration of six months. Had the fact been otherwise, there is no doubt the defendant would have strengthened his case by proving it. The consequence, then, is, that no forfeiture had occurred when the entry was made: and, on this ground, the plaintiff's right is not barred.

If reliance is placed on the breach of condition, an ejectment must be brought for the forfeiture; for the lease, in this case, is only voidable, and cannot be determined until the lessor re-enters in this manner. (1 *Saund.* 287. n. 1. *Woodfall*, 271.)

But if it were conceded, that the landlord did not take possession until after six months, there is no evidence that an ejectment was commenced, under which such entry was made; neither will the lapse of time support the presumption. It is true, that the legal owner may, for a certain species of injury, when a person who hath no right has previously taken possession of lands or tenements, make entry, which is defined to be an extrajudicial and summary remedy; in such case, the party entitled may make a formal, but peaceable entry on the land, declaring that thereby he takes possession. (*Co. Lit.* 417.) But when the original entry is lawful, and an apparent right of possession is gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. His remedy is by action. (*Co. Lit.* 57. b. 237. a.)

There is no sufficient evidence to support the presumption of a legal re-entry, either for the non-payment of rent, *or for condition broken; and, consequently, the plaintiff is entitled to judgment.

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Judgment for the plaintiff.

JACKSON, *ex dem.* PINTARD, against BODLE.

EJECTMENT to recover lot No. 11, in the sixth division of the *Minisink* patent, tried at the *Orange* circuit, in *September*, 1820, before Mr. Justice *Woodworth*.

It is essential to the validity of a deed, that the grantee is willing to ac-

cept it; and though such acceptance will be presumed from the beneficial nature of the transaction, when the grant is not absolute; yet this presumption is very slight, where the grantee derives no benefit under the deed, but is subjected to a duty, or the performance of a trust. (a)

Where *P.*, an insolvent debtor, in *New-Jersey*, in 1793, assigned all his property, under the insolvent act of that state, to *C.* and *D.*, in trust, for all his creditors, and there was no evidence of the trustees having taken the oath required of them by the act, and the trustees had done no act whatever, in execution of the trust, for above twenty years, and one of them had declared, in the presence of the other, who did not dissent, that he never qualified, nor acted, and never intended to act as trustee: *Held*, that this was sufficient evidence that they never had assented to become trustees, or accepted the deed of assignment; and that, therefore, nothing passed by the deed from *P.* to *C.* and *D.*

(a) Vid. *Jackson v. Perkins*, 2 *Wendell's Rep.* 308. *Jackson v. Richards*, 6 *Cow. Rep.* 617

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The plaintiff produced evidence, by which he deduced a title to *John Pintard*, one of the lessors. The defendant then read in evidence an exemplification of the proceedings under the late bankrupt law of the *United States*, against *John Pintard*, (the lessor,) as a bankrupt; by which it appeared, that the commission was issued in *July*, 1800, and that the bankrupt executed an assignment, pursuant to the statute, dated *May 29*, 1807, "of all the estate, right, title, interest, use, trust, property and possession, benefit and equity of redemption, claim and demand whatsoever, which the said *J. P.* had, at the time of his becoming a bankrupt, in trust for all his creditors." The defendant, also, gave in evidence a release, dated *May 30*, 1807, from the assignees of *P.*, the bankrupt, to *James A. Stewart* and *John A. Wells*, of all the lands of *P.*, the bankrupt, in the counties of *Ulster* and *Orange*, in the state of *New-York*, for the consideration of 750 dollars. The plaintiff's counsel objected to the evidence of this release, on account of the generality and vagueness of the description of the lands released; but the judge reserved all questions of law. The defendant's counsel insisted, that he had shown a title out of the lessors of the plaintiff. The counsel for the plaintiff then read in evidence an exemplification of the examination of *Pintard*, *before the commissioners of bankrupt, in *August*, 1800; in which he declared, among other things, that he had been discharged under the insolvent law of the state of *New-Jersey*, on the 22d of *May*, 1798, and had assigned and delivered up all his estate, real and personal, to *Elias Dayton*, *John N. Cummings* and *Jesse Baldwin*, his assignees, and that, at the time of his examination, he had no estate or effects whatever; and that the schedules, attached to his examination, contained true accounts of all his debts and effects, as exhibited when he so obtained his discharge under the insolvent act of *New-Jersey*; by which schedules, it appeared, that *Pintard* claimed and assigned about four thousand acres of land in the patent of *Minisink*. The plaintiff's counsel then produced in evidence, an exemplification of the proceedings of the Court of Common Pleas of *Essex* county in the state of *New-Jersey*, in the case of *John Pintard*, an insolvent debtor, and an assignment of all his estate, real and personal, by him, to the said *Dayton*, *Cummings* and *Baldwin*, made pursuant to the law of that state, dated *May 22d*, 1798, in trust, to and for the use and benefit of all the creditors of the said *Pintard*.

The defendant then gave in evidence an exemplification of certificate of the clerk of the county of *Essex*, in *New-Jersey*, authenticated in the manner required by the act of congress, that he had searched, and found no oath or affidavit of the said *Dayton*, *Cummings* and *Baldwin*, the assignees of *Pintard*, on the files or records of the said court. It was proved, that a short time before the trial of the cause, *Cummings*, one of the assignees of *P.* under the insolvent act of *New-Jersey*, declared, that the trustees had never qualified, and that he had nothing to do with the trust or property; that *Baldwin*, another of the assignees was present at the time the declaration was made by *C.* and said nothing of the oath, but refused to execute any release to *J. A. Stewart*; and it

appeared that *Dayton* was dead. It was also proved, that in *July*, 1816, *Cummings*, on being applied to for a release for some of the lots in the *Minisink* patent, said that he never had qualified as a trustee, and never intended to act under the assignment of *Pintard*.

*A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the facts as above stated; and all questions of law and evidence at the trial were reserved.

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Betts, for the plaintiff, contended, that the plaintiff had proved a title under *Pintard*, and his assignees, under the insolvent law of *New-Jersey*. The defendant had attempted to show a title out of the lessors, in purchasers under a deed from the assignees of *P.* as a bankrupt, in 1807, seven years after the bankrupt obtained a certificate of discharge, and which did not describe any property specifically. Such a general assignment by the commissioners of a bankrupt will not pass a particular estate in land. The property must be particularly described. The 11th, 12th and 17th sections of the act show that the commissioners must *specify* the real estate which they intend to convey or assign; so that, even if the commissioners had power, in 1807, to make a conveyance, he contended, that it has not been well executed. But the bankrupt law of the *U S.* was limited to five years, and expired in 1805, and after that term these commissioners had no power to convey.

Again; the commissioners of bankrupt were apprized of the assignment by *Pintard*, the bankrupt, previously made to the trustees, under the insolvent law of *New-Jersey*. The law will presume a delivery of the deed to the trustees, and an acceptance by them of the trust, until the contrary appears. Those assignees are the real lessors in this suit.

Billings and *D. B. Ogden*, contra, insisted, that by the bankrupt act of the *U. S.* all the property of the bankrupt was vested in the commissioners. In cases of bankruptcy or insolvency, the assignments are always general; and such a general description of land in a deed is sufficient. (*Jackson, ex dem. Livingston, v. De Lancey*, 11 *Johns. Rep.* 365.) The bankrupt law contained a saving of all proceedings under commissions actually issued at the time the act expired; and the commission in the case of *Pintard* had issued before that time.

Again; the assignees of *P.* under the insolvent law of **New-Jersey*, never took the oaths required of them by that law; and until they had qualified, they could not act as trustees; and it is proved that though above twenty years have elapsed, nothing has, in fact, been done by those trustees. Besides, the trustees, by virtue of the insolvent law of *New-Jersey*, can claim nothing in this state, under the assignment to them, for the benefit of the insolvent's creditors there. A record of proceedings, under an act of the legislature of *New-Jersey*, cannot pass land in this state. But admitting that the assignment was regular and duly executed, there is no evidence of its delivery or of its acceptance by the grantees. A deed, in order to pass land, must be executed and delivered

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according to the forms required by the laws of the state in which the land is situated.

SPENCER, Ch. J., delivered the opinion of the court.

The plaintiff's right to recover depends entirely on the effect of the discharge to *John Pintard*, and the assignment made to *Cummings* and *Baldwin*, under the insolvent proceedings in *New-Jersey*; for it does not admit of a doubt, that the assignment, under the bankrupt act, by the commissioners of bankruptcy, to *Moore* and *Farquhar*, the assignees of *Pintard*, passed all the estate and interest of *Pintard* in the premises. The act repealing the bankrupt act contained savings and provisos in favor of such cases as were then pending; and this case was then pending.

The question is, whether, under the facts proved in this case, the *New-Jersey* assignees can now for the first time, after the lapse of more than twenty years, assent to the trust, and take under a deed, when, during all that period, they have never acted, nor accepted the trust conferred on them by the assignment of the 22d of May, 1798. I am of opinion that they cannot. It is necessary to the validity of a deed, that there be a grantee willing to accept it. It is a contract, a parting with property by the grantor, and an acceptance thereof by the grantee. An acceptance will be presumed, from the beneficial nature of the transaction, where the grant is not absolute. The presumption is not so strong, that the grantee accepts the deed, where he derives no benefit under it, but is subjected to a duty, or the performance
[* 188] * of a mere trust. The non-existence of any oath, on the part of the assignees, to execute the trust, and the lapse of so many years, without having executed it, coupled with the declarations of one of the two surviving trustees, in the presence of the other, without any dissent on his part, that they had nothing to do with the trust, that they had never qualified, had no concern with the property, and never intended to act, make out the fact, that they never agreed to accept the trust, and, consequently, never assented to the deed. In *Jackson, ex dem. M'Crea, v. Dunlap*, (1 Johns. Cas. 114.) and in *Jackson v. Phipps*, (12 Johns. Rep. 422.) the principle is distinctly advanced, that it is essential to the legal operation of a deed, that the grantee assent to receive it, and that there could be no delivery without an acceptance.

Without examining the other points in the case, this is decisive against the plaintiff's right of recovery

Judgment for the defendant.

JACKSON, *ex dem.* SMITH, *against* GOODELL.

The Indian tribes within this state, are subject to the jurisdiction and laws of the

THIS was an action of *ejectment*, brought to recover the possession of lot No. 33, in the township of *Junius*, in the county of *Seneca*, and was noticed for trial at the *Seneca* circuit, in 1821, when the parties agreed to submit the cause to the opinion of the court,

on a case containing the following facts: Letters patent for the lot in question, and for another lot in *Junius*, dated *January 29, 1791*, were granted to Lieutenant *John Sagoharase*, an *Oneida Indian*, who served in the line of this state, in the army of the *United States*, in the revolutionary war, and *died *March 27, 1783*, leaving a son, named *William*, his only lawful issue, and who resided with the tribe of *Oneida Indians*. *William*, the son of the patentee, in 1797, in consideration of 250 dollars, conveyed lot No. 33 to *Peter Smith*, the lessor of the plaintiff, in fee; and the deed was regularly proved and recorded, on the 16th of *September, 1797*. He, *William S.*, afterwards, on the 6th of *May, 1810*, for the consideration of 300 dollars, executed a deed, in fee, for the same lot, to *Elijah Miller*, which deed was acknowledged by the grantor, and approved by the surveyor-general, in pursuance of the act in such case made and provided. The defendant was in possession of the lot, claiming title under *E. Miller*; and before the suit was commenced, the lessor of the plaintiff demanded the possession, and to have the improvements on the lot appraised, according to the statute of *April 8, 1813*, and the defendant refused to join in such appraisement.

It was agreed, that if the court should be of opinion that the plaintiff is entitled to recover, the defendant might enter up judgment as upon a special verdict containing the above facts; and in case the court should be of opinion in favor of the defendant, the plaintiff was to be at liberty to enter judgment as upon a special verdict containing the same facts.

D. Cady, for the plaintiff.

E. Miller, for the defendant.

SPENCER, Ch. J., delivered the opinion of the court.

In the case of *Jackson v. Sharp*, (14 *Johns. Rep.* 472.) it was decided, that an *Indian* patentee might aliene lands granted to him individually; and it was held, that a conveyance by an *Indian* patentee, given in the year 1791, was valid, effectual and operative, to vest all his right in the grantee. We were of opinion that the inhibition in the constitution against the purchase of lands from *Indians*, as well as the act of the 18th of *March, 1788*, related solely to purchases of land from *Indians*, as a tribe, or community, and did not extend to a case of individual ownership. We *were of opinion, also, that the case of *Jackson v. Wood* (7 *Johns. Rep.* 290.) was decided under the act of 1801. (1 *R. L. K. and R.* 464.) In the latter case, the deed from the *Indian* was posterior to the act of 1801. But in the case of *Jackson v. Sharp*, the deed from the *Indian* was in 1791. In the present case, the deed under which title is deduced, was executed by the son and only child of the *Indian* patentee, to the lessor of the plaintiff, on the 10th of *September, 1797*; so that this case must be decided independently of the act of 1801, or any subsequent legislative enactment; and the question is, simply, whether a legitimate child of an *Indian*,

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state. These *Indians* are not aliens, but citizens, owing allegiance to the government, and entitled to its protection.

They may acquire property, by purchase or descent, and aliene or transmit the same, as natural born citizens; subject, however, to such regulations as the legislature may prescribe, for their security against imposition and fraud.

A deed, therefore, executed in 1797, in the usual form, by the only son of an *Indian*, to whom lands had been granted by the state, for his services, as a soldier in the revolutionary war, claiming and holding the same, as heir to his father, is valid; there being at the time of the conveyance, no law of the state, disabling individual *Indians*, seised of real estate, from aliening their lands, or regu-

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lating the manner of their conveyance. (a)

(a) Vid. *Goodell v. Jackson*, post, 693. *Lee v. Glover*, 8 *Cow. Rep.* 189.

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holding property by grant from the state to him individually, is to be regarded as his *heir*, so far as to take by inheritance; and this involves the inquiry whether an *Oneida Indian* is to be considered a citizen of the state, or an alien.

By the 55th section of the act (2 *N. R. L.* 175. sess. 36. ch. 92.) (a) the heirs of *Indians* to whom lands had been granted by this state for military services in the then late war between the *United States* and *Great Britain*, were made capable of taking and holding any such lands by descent, in the same manner as if such heirs were citizens of this state, at the death of his, her, or their ancestors; and it is further provided, that every conveyance hereafter to be executed, by such patentee or his heirs, to any citizen of this state, shall be valid, if executed with the approbation of the surveyor general, to be expressed by an endorsement on such conveyance, and signed by the surveyor-general; with a proviso, that nothing in the act shall in any manner confirm any deed or conveyance theretofore executed by the patentee or his heirs. This act was passed in 1813. Although the act is not a declaratory one, yet it is manifest, that the legislature must have supposed, either that an *Indian* heir could not take by descent, and could not aliene without legislative provision; or they must have considered it a doubtful case, requiring some legislative enactment to remove a supposed disability on the part of the *Indian* heirs. We are now, however, required to pronounce upon their condition antecedently to this act. In the case of *Jackson v. Wood*, the then chief justice, *Kent*, threw out some general remarks on the state of the *Oneida Indians*. He observed, that their political relation to this state was peculiar, and *sui generis*; and that if they were not aliens in every sense, because of their dependence as a tribe, and their right to protection, they could not be considered as subjects born under allegiance, and bound, in the common law sense of the term, to all its duties. But no direct or decided opinion was intended to be expressed by the learned judge, or by the court, whether the issue of an *Indian*, dying seised of land, could take by descent; for the case did not call for such opinion.

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Natural born subjects are defined by *Blackstone*, (1 *Bl. Com.* 366.) to be "such as are born within the dominions of the crown of *England*; that is, within the ligeance of the king." "Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject." Allegiance, both express and implied, is of two sorts; the one natural, the other local; the former being perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions, immediately upon their birth; for, immediately upon their birth, they are under the king's protection. Natural allegiance, he says, is perpetual, and for this reason, evidently founded on the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. Natural born

(a) 1 *Rev. Stat.* 720.

subjects have a great variety of rights, which they acquire by being born within the king's ligeance, which can never be forfeited, but by their own misbehavior; but the rights of aliens are much more circumscribed, being acquired only by residence, and lost whenever they remove. "If an alien," he says, "could acquire a permanent property in lands, he must owe an allegiance equally permanent to the king, which would probably be inconsistent with that which he owes his natural liege lord; besides, that thereby the nation might, in time, be subject to foreign influence, and feel many other inconveniences. It is on these principles that an alien, when he purchases lands, cannot hold them, if the government see fit to proceed for an escheat, *and that he is absolutely precluded from taking by descent, having no heritable blood."

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These *Indians* are born in allegiance to the government of this state, for our jurisdiction extends to every part of the state; they receive protection from us, and are subject to our laws. Indeed, our legislature regulate, by law, their internal concerns, and exercise entire and perfect control over them. By an act of the last session of the legislature, (sess. 45. ch. 204:) (a) it is enacted, that the sole and exclusive jurisdiction of trying and punishing all and every person, of whatever nation or tribe, for crimes and offences committed within any part of this state, except only such crimes and offences as are cognizable in courts deriving jurisdiction under the constitution and laws of the *United States*, of right, belongs to, and is exclusively vested in, the courts of justice of this state. The preamble to this act recites, that the *Seneca* and other tribes of *Indians* residing within this state, have assumed the power of trying and punishing, and in some cases capitally, members of their respective tribes, for supposed crimes by them done and committed in their respective reservations, and within this state. It further recites, that the sole and exclusive cognizance of all crimes and offences committed within this state belongs, of right, to courts holden under the constitution and laws thereof, as a necessary attribute of sovereignty. The act proceeds to pardon *Tommy Jemmy*, otherwise called *Soo-non-gize*, an *Indian* of the *Seneca* tribe, for the murder of an *Indian* woman, alleged to have been committed within the *Seneca* reservation. This statute not only asserts the exclusive jurisdiction of this state over all crimes or offences committed within the *Indian* reservations; but it expressly negates any jurisdiction to the *Indian* tribes, to take cognizance of offences committed therein, even by those of their own tribes. If, then, our jurisdiction exclusively reaches them, if they have no right to punish offences, if they receive protection from our government, are subject to our legislation, being born within the state, they must owe to this government a permanent allegiance, and they cannot be aliens. It does not affect the question, or make them less citizens, that we do not tax them, or require military *or other services from them. This is a mere indulgence arising from their peculiar situation. For a long succession of years, we have exercised an entire supremacy over all the tribes within the state, and have regulated by law their inter-

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(a) 2 Rev. Stat. 697.

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nal concerns, their contracts, and their property. In one sense only, they may be considered as having the semblance of national rights, as regards their right to retain to their own use, or to dispose, under the regulations of our government, of their lands. In every other sense, they are as completely the subjects of our laws as any other citizens; and we must conclude, that they are citizens. When, therefore, the legislature attempted to impart to them the right of inheritance, they conferred no new right, for they had already acquired it. We do not mean to say, that the condition of the *Indian* tribes, at former and remote periods, has been that of subjects or citizens of the state. Their condition has been gradually changing, until they have lost every attribute of sovereignty, and become entirely dependent upon, and subject to our government. I know of no half-way doctrine on this subject. We either have an exclusive jurisdiction, pervading every part of the state, including the territory held by the *Indians*, or we have no jurisdiction over their lands, or over them, whilst acting within their reservations. It cannot be a divided empire; it must be exclusive, as regards them or us; and the act referred to, as well as the actual state and condition of the *Indian* tribes within this state, shows that the jurisdiction is in the state, and, consequently, upon the principles of the common law, they must be citizens. This being the case, *William Sagoharase* took the lot in question by descent, as heir to his father, *John Sagoharase*, to whom it had been granted in 1791, for military services; and *William*, the heir, having aliened it, prior to any statute disabling an *Indian* individually seised of real estate, from aliening his lands, the lessor of the plaintiff acquired a legal title thereto. It is not intended to question the power of the legislature to regulate the manner in which *Indians* are to convey their property, real or personal. They may treat them as wanting discretion to manage their property, and devise guards and checks against frauds upon them. But nothing of this kind had *been done when the deed, under which the plaintiff claims, was executed, and it must, therefore, prevail.

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Judgment for the plaintiff.

L. & S. DENISON *against* The Schooner APPELONIA
and her Owners.

Under the act authorizing the arrest of ships and vessels, for debts, &c., passed the 10th of August,

1798, (1 N. R. L. 130. sess. 22. ch. 1.) and the act of the 28th of February, 1817, (sess. 40. ch. 60.) in amendment thereof, the lien on the vessel ceases, 1. When she has left the state; 2. When, after being arrested, the owners give bonds with sureties, &c.; and, 3. When, after being arrested, no security is given, but the vessel has removed to another port, or place, in the state, for more than twelve days, after the arrest. The proviso of the last act does not apply to the case where the vessel was removed, and continued absent from the port or place where the supplies and materials were furnished, more than twelve days before the arrest.

*a) 2 Rev. Stat. 493, 494.

same, passed *February 28, 1817*, (sess. 40. ch. 60.) (a) against the schooner *Appelonia*, for labor and materials furnished for the said vessel, at *Sackett's Harbor*. The president, directors and company of the bank of *Utica*, as owners of the vessel, pleaded, 1. *Non assumpsit*. 2. That as to one hundred and twenty-five dollars and four cents, part and parcel of the demand or *lien* of the plaintiff's, it arose on or about the 2d of *December, 1819*; that the schooner was arrested on the 30th of *December, 1820*, and that before the arrest, to wit, on the 1st of *June, 1820*, the said schooner left, and, for more than twelve days, continued absent from the port of *Sackett's Harbor*, where the supplies and materials were furnished, and where the schooner might have been arrested, whereby the supposed *lien* of the plaintiff, as to the one hundred and twenty-five dollars and four cents, part and parcel of their demand, ceased. To this plea, there was a demurrer and a joinder in demurrer. There was no judgment on the demurrer in the court below; and the cause came before the court on the same pleadings as set forth in the return to the *certiorari*; and was submitted without argument.

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Per Curiam. The first act (10th of *August, 1798*, 1 N. R. *L. 130.) gives a *lien* on the ships and vessels of non-resident owners, and contains a general provision, "that the *lien* shall cease immediately after such ship or vessel shall have left this state." (s. 5.) It also provides that the owner may give bonds with sureties, to satisfy the demands, and then the ship "shall be discharged from the attachment, and be permitted to proceed on her voyage." (s. 4.)

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The amendatory act of *February 28, 1817*, (sess. 40. c. 60.) extends the provisions of the first act to vessels owned by persons resident in this state; with a proviso, "that in case of the arrest of any ship or vessel by virtue of the said recited act, and bond given pursuant to the 4th section thereof, the *lien* created by the said act on such ship or vessel shall immediately cease: and provided, also, that the said *lien* shall in no case endure beyond twelve days after such ship or vessel shall leave the port in which the same may have been so arrested."

The plea is bad. No part of the proviso in the last act applies to any vessel, except such as "may have been so arrested" under the statute. The statute discharges the *lien* in three cases; 1st. Where the vessel "*has left this state*;" 2d. Where she has been "arrested" and given bonds, &c.; 3d. Where she has been "arrested" and given no security; but has removed to another port or place in this state, for the space of more than twelve days *after the arrest*.

The averment in this plea does not show either of these cases. It is merely, "that *before the said arrest*, the schooner left and continued absent more than twelve days from the port of *Sackett's Harbor*, where the supplies and materials were furnished," &c.

Judgment for the plaintiffs on the demurrer.

(a) 2 Rev. Stat. 493, 494.

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*SWETT against COLGATE and others.

Though on the sale of goods, there is an implied warranty as to the title, yet the vendor is not answerable for their quality or goodness, unless there is an express warranty or fraud. (a)

As, where the article sold was considered and described as *barilla*, and was examined by the vendee before the sale at auction, and a sample exhibited at the sale, and the article was supposed to be *barilla*, and purchased as such; but afterwards, the vendee, on using some of the article, in the manufacture of soap, discovered that it was not *barilla*, but

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kelp, which greatly resembles it, but is an article of very little or no value: Held, that there being no express warranty or fraud on the part of the vendor, no action would lie against him, at the suit of the vendee, who had offered to pay for what he had used, and to return the residue; and the bad quality of the article, therefore, was no defence to a suit brought by the vendor, to recover the price for which it was sold.

To constitute an express warranty, it is essential that the affirmation, at the time of sale, should be intended by the party as a warranty; otherwise, the affirmation is only matter of judgment or opinion.

(a) *Welsh v. Carter*, 1 *Wendell's Rep.* 185. *Duffee v. Mason*, 8 *Cow. Rep.* 25. *Oncida Manufacturing Society v. Lawrence*, 4 *Cow. Rep.* 440.

ASSUMPSIT for goods sold and delivered. The goods were consigned, by merchants in *England*, to the plaintiffs, in *Boston*, as their factors, who sent them to Messrs. *Goodhue & Co.* of *New-York*, and were invoiced as *barilla*. After offering the article, for some time, at private sale, Messrs. *G. & Co.*, pursuant to instructions, sent it to auction, where it was sold, after being advertised in the newspapers, to the defendants, at a credit of sixty days. *G. & Co.* offered it for sale as *barilla*, and it was advertised and sold as such, and was described in the bill of parcels, delivered to the defendants, as *barilla*. The quantity sold was 35 tons and 35 pounds, at 30 dollars per ton.

Barilla is a substance procured from a plant of that name, cultivated on the coasts of the *Mediterranean* sea, and there manufactured. It contains *soda*, or *alkali*, which constitutes its only value, being used in the manufacture of soap, and for which purpose it was bought by the defendants, who are soap manufacturers. After using part of the article, the defendants discovered that it was not *barilla*, but *kelp*, which is a substance greatly resembling *barilla*, but containing a very small proportion of the *alkali*, or *soda*. *Kelp* is made in *Great Britain*, from sea-weed, and cannot be distinguished from *barilla*, except by analysis. *Barilla* contains about 50 per cent. of *alkali*, or *soda*, but *kelp* not more than 5 per cent. *Kelp* is not used in this country, in the manufacture of soap, nor for any purpose, it being in hard masses, and not worth the expense of breaking it up; though it is used as a substitute for common salt, in *Great Britain*, where they use *barilla* in the manufacture of soap. Previous to the sale at auction, the article was several times examined by one of the defendants, who bid for, and purchased it at auction, for them; and a sample of it was exhibited at the time of sale. *Goodhue & Co.*, before the sale, knew that the article was of bad quality, but did not know that it was any other than *barilla*. On discovering that the article was not *barilla*, and before the term of credit given at the sale was expired, the defendants offered to pay Messrs. *Goodhue & Co.* for six and three quarters tons which had been used, at the rate of thirty dollars per ton, and to return to them the residue; but *Goodhue & Co.*, being agents, declined the offer; and the present suit was brought under their direction, in the name of the plaintiff; it being agreed by the defendants, that no objection should be made on that account; but that the case should be considered in the same manner as if the suit had been brought by the *English* consignors. The cause came before the court, on a case containing the facts above stated.

P. A. Jay, for the plaintiff. If the article sold turns out to be

different from what it was supposed to be by both parties, the civil law authorizes the vendee to rescind the contract; but the common law does not. In other words, where there is no fraud, and no agreement to the contrary, the civil law throws the loss on the seller, and the common law upon the purchaser. If the law on the subject is settled and universally known, the one rule may be as equitable as the other. The rule of the common law of *England*, as it existed at the time of our revolution, was recognized and adopted as the law of this state, in the case of *Seixas v. Woods*, (2 *Cain's's Rep.* 48.) and the doctrine of that case has since been steadily adhered to by this court. (*Snell v. Moses*, 1 *Johns. Rep.* 96. *Perry v. Aaron*, *Id.* 129. *Defreeze v. Trumper*, *Id.* 274. *Holden v. Daken*, 4 *Johns. Rep.* 421. *Davis v. Meeker*, 5 *Johns. Rep.* 354. *Sands v. Taylor*, *Id.* 395. *Cunningham v. Speir*, 13 *Johns. Rep.* 392. *Fleming v. Slocum*, 11 *Johns. Rep.* 403. *Thompson v. Ashton*, 16 *Johns. Rep.* 316.) The same rule is recognized by *Washington, J.*, in the case of *Willing and others v. Consequa*, (1 *Peters's Rep.* 317.) decided in the Circuit Court of the *United States*.

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It is not denied, that in the later *English* decisions, slight circumstances have sometimes been considered as amounting to a warranty; but, even as the law now stands in the *English* courts, the plaintiff is entitled to judgment. If *J. S.* orders goods, without seeing them, and the vendor sends goods which do not answer the description, *J. S.* is not bound to keep them, or to pay for them. This is too obviously just to require any argument or illustration. *J. S.* cannot be bound to pay for what he has not agreed to purchase. This will serve to explain many of the *English* cases which may be cited by the defendants.

Again: If *J. S.* buys on the representation of the vendor only, and without seeing the article, he is not bound to pay for it, if it should prove to be different from what it was represented. It is said, indeed, that the representation amounts to a warranty; but the true reason of the rule is, that the article delivered is not that which *J. S.* agreed to purchase.

If I agree with a wine merchant for a cask of *Madeira* wine, and that which he sends to me proves to be *Teneriffe* wine, I am not bound to pay for it. (*Gardiner v. Gray*, 4 *Camp. N. P. Rep.* 144.) But if the wine is shown to me, and a sample is offered for me to taste, and, after tasting the sample, I agree to purchase it, I must pay for it, though the vendor called it *Madeira* wine, and I paid the price of *Madeira*, and though it proves to be *Teneriffe*; unless the vendor *knew*, at the time of sale, that it was not *Madeira*, or unless he *warranted* that it was *Madeira*. So, where there is a sale by sample, the vendee is not bound to accept the bulk of the commodity, unless it agrees with the sample; but if it does agree with the sample, he is bound to pay for it, unless there be either *fraud* or a *warranty* on the part of the vendor. By a *warranty*, is meant any engagement, no matter in what words expressed, by which the vendor takes upon himself the responsibility as to the nature of the article sold. But as any form of words may amount to a warranty, where they are so understood by the parties,

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so no words will make a warranty, where they are not so understood by the parties.

*It is admitted, in the present case, that there was no fraud on the part of Messrs. *Goodhue & Co.*; but it will be contended, that there was a fraud in the persons who consigned the article to the plaintiffs. But the case states, that *barilla* and *kelp* are so nearly alike in their appearance, that they cannot be distinguished without a chemical analysis; and the defendants, though in the constant habit of using *barilla* in their manufacture, and therefore must have had great skill and experience in ascertaining the genuineness of the article, and though they repeatedly inspected it before the sale, were, after all, deceived in relation to it. Can it, then, be supposed, that merchants, not in the habit of using the article, could have been better judges of its nature? Fraud is odious, and not to be presumed.

The article was sold at auction, by sample, which the defendants examined; the only warranty, therefore, was, that the bulk of the article corresponded with the sample; and that it did so, is admitted. The bill of parcels did not amount to a warranty, nor was it intended as such; besides, the sale was consummated by the delivery. The bill of parcels merely ascertained the price or amount to be paid. Nor can it be objected, that a warranty is to be implied from the *invoice*. It was not exhibited at the sale, or shown to the defendants. It was merely sent by the shippers to their agent in *Boston*, and was not intended as a warranty or engagement. Supposing the owners to have acted with good faith, they must have sent such an invoice, because they believed it to be true. But it will be said, that though an *express* warranty is necessary, to make the vendor liable for the *quality* of the article sold, yet a warranty is always *implied* that the article is that for which it is sold. But no such distinction is to be found in the cases which have been cited. It is frequently the *quality*, that makes all the difference in the value of the article to the purchaser. In what else consists the difference between *Madeira* and *Port* wine? between ale and small beer? or between rum and brandy? But, in fact, *barilla* and *kelp* are only different qualities of the same article. Each contains a mixture of *soda* with vegetable ashes. The only difference between them, which *the most expert chemist can detect, is, that one contains a larger proportion of *soda* than the other.

• *Winter* and *Bolton*, contra, contended, 1. That from the facts in the case, it was to be inferred, that the real plaintiffs, the consignors in *England*, knew that the article in question was *kelp*, and not *barilla*. It was a fraud, therefore, in them, in invoicing and representing it as *barilla*, whereby their agents were induced to offer it for sale as *barilla*, and the defendants to purchase it as such. They ought not, then, to recover in this action. In *Beecker v. Vrooman*, (13 *Johns. Rep.* 302.) it was decided, that in an action to recover the price of goods sold, the defendant may prove a fraud or deceit in the sale, so as to defeat the action, or mitigate

the damages claimed by the plaintiff. (S. P. *Grant v. Button*, 14 *Johns. Rep.* 377.)

2. The article in question having been advertised and sold as and for *barilla*, and so described in the bill of parcels accompanying the delivery of it to the defendants, an undertaking on the part of the vendors that it was *barilla*, is to be inferred. In *Bradford v. Manly*, (13 *Mass. Rep.* 139.) the defendant sold two casks of *cloves*, by a sample which was of the best quality of *Cayenne* cloves: but, after the delivery of them to the vendee, it was found that the casks contained a mixture of *Cayenne* cloves with those of an inferior and distinct species, of the growth of the *East Indies*, and which were of much less value; and the court held, that a sale by sample was tantamount to an express warranty, that the article sold was of the same quality as the sample. Ch. J. *Parsons*, in delivering the opinion of the court, mentioned a case decided by him at *nisi prius*, where the defendant advertised for sale good *Caraccas* cocoa, and the plaintiff examined it, before he made the purchase, but did not know the difference between *Caraccas* or other cocoa; and it was proved that the *cocoa* was of the growth of some other place, and of much inferior value to that of *Caraccas*; and he held, that the *advertisement* by the plaintiff was equivalent to an express warranty that the article was *Caraccas* cocoa. In *Bridge v. Wain*, (1 *Starkie's N. P. Rep.* 504.) the defendant sold to the plaintiff a quantity *of *scarlet cuttings*, intended for the *Chinese* market, and which were understood, among merchants, to mean cuttings of cloth only, without mixture of serge or other materials; and it was proved that the article sold contained a quantity of serge, and part consisted of much smaller shreds than those usually sent to *China*, and would be very unprofitable, if not wholly unsaleable; there was no special warranty, but the goods were described in the bill of parcels as *scarlet cuttings*; and Lord *Ellenborough* ruled, that if they were sold by the name of *scarlet cuttings*, and were so described in the invoice, an undertaking that they were such was to be inferred. In *Gardiner v. Gray*, (4 *Campbell's N. P. Rep.* 144.) the declaration contained a count on a sale of twelve bags of silk, by sample; but the *written sale note*, not mentioning it as a sale by sample, or specifying the particular quality, but merely twelve bags of *waste silk*, at 10s. 6d. per pound, Lord *Ellenborough* decided, that the plaintiff could not recover on the count alleging the sale by sample; but he was of opinion, that, under the circumstances, the plaintiff was entitled to expect a saleable article, answering to the description in the contract; that, without any particular warranty, that was an implied term in every contract; that where there was no opportunity to inspect the commodity, the maxim of *caveat emptor* did not apply. (*Prossen v. Hooper*, 1 *Moore's Rep.* 106. In *Jones v. Bowden*, (4 *Taunt. Rep.* 347.) *Heath, J.*, mentioned a trial before him, in an action on the sale of sheep, sold as *stock*; and the evidence was, that, by the custom of the trade, *stock* were understood to be sheep that were sound; and he directed the jury that it amounted to an implied warranty that they were sound; and that direction was never questioned. In *Chapman v. Murch*, (19 *Johns. Rep.* 290.)

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it was decided, that any express or direct *affirmation* of the quality and condition of a thing, as contradistinguished from opinion, &c. or any words of equivalent import, showing the intention of the parties that there should be a warranty, will be sufficient to support an action on a warranty of the soundness of the chattel sold.

3. Though there must be an express warranty as to the *quality* of the article sold, yet we insist there is always an **implied* warranty that the article is that for which it is sold; and such appears to be the understanding of the court, in the cases which have been cited.(a)

WOODWORTH, J., delivered the opinion of the court.

The defendants purchased, at auction, the goods in question, invoiced as *barilla*, and advertised and sold as such; but there was no warranty, nor any concealment on the part of the vendors.

The goods were consigned by certain merchants in *England* to the plaintiffs, who sent them to Messrs. *Goodhue & Co.* at *New-York*, to be sold; they were described as *barilla*, in the bill of parcels. After the purchase, the defendants discovered that the article purchased was not *barilla*, but *kelp*. Before the sale, they inspected and examined it; and a sample was exhibited at the time of sale. *Goodhue & Co.* knew it was an article of bad quality, but did not know that it was other than *barilla*.

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I cannot discover any thing in this case that will justify the charge of unfairness or imposition. *Kelp* is a substance greatly resembling *barilla*, and from which it is not easily distinguishable. The defendants first made the discovery, after they had used a part. There is no ground to suppose, **that* the consignors knowingly made a false representation. They were, probably, deceived themselves, and cannot be subjected to the imputation of fraud, unless that fact be clearly established by proof. The question, then, is, whether the loss shall fall on the seller or the purchaser.

By the common law, where there is no fraud or agreement to the contrary, if the article turns out not to be that which it was supposed, the purchaser sustains the loss: the rule is, *caveat emptor*. If he doubts the goodness of the article, or does not choose to incur the risk of a latent defect, he may refuse to purchase without a warranty. The leading case, in this court, is that of *Seixas v. Woods*, (2 *Caines*, 48.) which was an action for selling *peachum wood* for *brazillette*; and it is very analogous to the present case.

(a) *Fonblanque*, (*Treatise of Equity*, vol. 1. p. 109. note x.) observes, that "the writers upon natural law maintain, that an error about a thing, or about its quality, upon prospect of which a man is induced to come to any agreement, renders the agreement or bargain void; for, in such case, a man is not conceived to have agreed absolutely, but upon supposal of the presence of such a thing, or quality, on which, as on a necessary condition, his consent was founded; and, therefore, the thing or quality not appearing, the consent is understood to be null and ineffectual; (*Puff. L. N. and N. b. 1. c. 3. s. 12.*) and the civil law, on this principle, seems to have required the seller, in some cases, to declare the defects of the thing sold (*Dig. lib. 21. tit. 1. l. 1. s. 1. Domat's C. L. b. 1. tit. 2. s. 11. Cicero de Officiis*, lib. 3. c. 12, 13, 14.) But the general rule of the common law of *England* is, *caveat emptor*, upon which rule, it seems, the vendor, without an express warranty, merely undertakes to make a good title to the vendee; to show that the goods delivered are such as were contracted for." "In the sale of goods, the law implies the warranty of title; for the purchaser cannot have better evidence of title to goods, than the possession of the vendor." (*Id.* 373. n. k. 371. n. h.) (See, also, *Pothier, Traite des Oblig. Part 1. c. 1. s. art. 3. n. 17, 18, 19, 20. 3 Black. Com. 164, 165 1 Carth. 90. Lord Raym. 593. 1 Salk. 210. 3 Term Rep. 57. 2 Dallas's Rep. 91. 1 Hayw Rep. 464. 2 Bay's Rep. 380. 2 Caines's Rep. 48.*)

The article was advertised and invoiced as *brazillette*, and described as such in the bill of parcels, and supposed so to be, by the parties. The plaintiff's agent saw the wood, when unloaded and delivered, and no fraud was imputed. The principle established was, that, to maintain an action for selling one article for another, there must be either a *warranty* or *fraud*. This seems to have been the uniform language of the *English* law, and has been recognized in this court by subsequent decisions. (*Snell v. Morris*, 1 *Johns. Rep.* 96. *Perry v. Aaron*, 1 *Johns. Rep.* 129. *Defreese v. Tremper*, 1 *Johns. Rep.* 274. *Holden v. Dakin*, 4 *Johns. Rep.* 421. *Davis v. Meeker*, 5 *Johns. Rep.* 354. 395. *Cunningham v. Spier*, 13 *Johns. Rep.* 392. *Fleming v. Slocum*, 18 *Johns. Rep.* 403.)

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There are no particular words prescribed by law to make out a warranty; but it is essential that the affirmation made at the time of sale, be intended by the parties as a warranty, and this must appear by the evidence; if it does not, the affirmation is considered as a mere matter of judgment and opinion. (2 *Caines*, 56. 3 *Term Rep.* 57.) The article sold to the defendants had uniformly been considered and described as *barilla*. The bill of parcels followed this description, which both parties at the time believed to be the true one; but it was evidently an opinion, and not a warranty. With respect to the title to the goods sold, an express warranty is not necessary; for it is a general rule *that the law will imply a warranty of title, and that is all the defendants can require. The rule is correctly laid down in 2 *Black. Com.* 451. that "with regard to the goodness of wares purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and hath used any art to disguise them, or unless they turn out to be different from what he represented them to the buyer." (1 *Johns. Rep.* 275.) The latter alternative would apply to a case where the purchase was made on the representation of the vendor, without seeing the article. The purchaser would not be bound to pay for it, if it proved to be different from the vendor's representation, because, then, it is not the thing agreed to be purchased. If a vendor agrees to sell and deliver *Madeira wine*, and he sends *Teneriffe*, the vendee is not bound to pay. The sale in this case was by sample. The purchaser was not bound to accept the article purchased, unless it agreed with the sample; but it did agree, and that absolved the plaintiffs from further responsibility. (4 *Camp. N. P. Rep.* 144.) There was no implied undertaking as to the quality. A sample was fairly taken from the bulk; the defendant exercised his judgment on it, and bought it at his own risk.

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We are of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

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M. STERLING *against* H. H. SHERWOOD.

A plea to a declaration for a libel, justified as to part of the libel charged, [* 205] but did not profess to answer the whole, though it prayed judgment of the action generally: *Held*, that the plaintiff might demur to such defective plea; and that, by so doing, he did not discontinue his suit. (a)

THIS was an action for a libel. The declaration contained two counts, and charged the libel to have been composed and published on the 10th of *April*, 1821, of the plaintiff, and of and concerning his profession as an attorney, and particularly as attorney of the *Jefferson County Bank*. The libel set forth, also, charged the plaintiff with being a friend to slavery, and trafficking in human flesh. The defendant pleaded, 1. Not guilty to the whole declaration. 2. A special justification to the first count. 3. A justification as to the second count. The plaintiff demurred to the second and third pleas, and stated the causes: 1. That the pleas do not answer so much of the libellous matter charged in the declaration as they profess to answer; nor do they answer any one count in the declaration. 2. That the pleas do not allege when and in what manner the plaintiff was appointed attorney to the *Jefferson County Bank*. 3. That the pleas do not set forth and allege at what time and in what manner the said bank was ruined by discounting the money mentioned in the pleas. 4. The pleas do not allege that the plaintiff was guilty of any flagrant or foul conduct as attorney of the said bank, nor that he was guilty of any extortion or oppression as attorney of the bank, or that he did any other act, with an intent to harass and oppress the debtors of the bank. 5. That the pleas do not set forth the name or names of any person or persons who were ruined by the bank and the plaintiff, as attorney of the bank; nor from whom, nor in what manner, or at what time, the last shilling was wrung; nor do the pleas set forth the name or names of the person or persons to whom the money of the bank was loaned, nor whether they were solvent; nor whether they were known to be insolvent, at the time the money was loaned to them; nor in what manner, nor how often, nor upon what terms, the notes were renewed. 6. That the pleas and the matters therein contained, amount to the general issue, and ought not to have been pleaded specially. 7. That the pleas do not allege any fact to justify the charges contained in the libel, of trafficking in human flesh. 8. That the pleas are too general and uncertain, &c.

The defendant joined in demurrer.

J. Lynch, in support of the demurrer, cited 1 *Saund.* 28. note 3. *Willes's Rep.* 480. 1 *Chitty's Pl.* 509. *Cro. Jac.* 27.

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**Storrs*, contra.

SPENCER, Ch. J., delivered the opinion of the court.

The plaintiff has demurred to the defendant's 2d and 3d pleas. The objections principally relied on are, that these pleas are an answer only to a part of the libellous matter charged in the dec-

(a) *Hicok v. Coates*, 2 *Wendell's Rep.* 419. *Jackson v. M'Claskey*, 2 *Ibid.* 541.

laration; and, also, that the matter set up in justification, does not justify the libellous charge.

It is laid down by Mr. *Chitty*, (1 *Chitty's Pl.* 509, 510.) and by Serjeant *Williams*, (1 *Saund.* 28. n. 3.) that if a plea begin only as an answer to part, and is in truth but an answer to part, the plaintiff cannot demur, but must take his judgment for the part unanswered, as by *nil dicit*: and if he demurs or pleads over, the whole action is discontinued. The most disgraceful part of the libel, as charged, is unanswered in this case; and, though the pleas justify as to part of the libel, they do not profess to answer the whole libel, though they pray judgment of the action generally.

It appears to me, the position laid down by Mr. *Chitty* and Serjeant *Williams*, is not law, and that the cases they refer to, do not bear out the proposition. On the contrary, there are several cases which are directly opposed to it. In *Riggs v. Deniston*, (3 *Johns. Cas.* 205.) *Kent, J.*, lays down the rule thus: That as the plea did not, either by denying or justifying, meet the whole matter or *gravamen* contained in the count, it was, for that reason, bad; and he referred to 2 *Vent.* 193. *Cro. Jac.* 27. *Cro. Eliz.* 434. It does not expressly appear by the case, whether the plea professed to answer the whole declaration or not; but I infer that it did not, or else that would have been relied on in the opinion delivered. This question is very fully discussed by *Willes, Ch. J.*, in *Bullythrope v. Turner*, (*Willes's Rep.* 475. 480.) He reviews all the cases then extant, and he pronounced it absurd to say, that the defendant could discontinue the plaintiff's action by putting in a defective plea. He observed, "If he demur, it is said he discontinues his own suit, for he ought to have entered up judgment by *nil dicit*, considering it no plea at all; but this, I think, is a practice that ought not to be encouraged; for it is saying, the plaintiff may judge for himself, without submitting his case to the judgment of the court. If, indeed, there were no plea at all, the plaintiff might enter up such judgment; but if there be, in fact, a plea, though a defective one, I think that, in all cases, he ought to pray the opinion of the court, which he can do no otherwise than by demurring, and not to judge for himself." He cited *Yelv.* 38. and *Cro. Jac.* 27. The case in *Yelverton* was decided finally on a writ of error, in the *King's Bench*, from the Common Pleas. The cases cited justify the decision in *Willes*; and it seems to me the reasoning is sound and conclusive.

The next objection to the pleas relates to the sufficiency of the justification, in this, that the libel charges that the plaintiff has proved himself the friend of slavery, has trafficked in human flesh, &c. The pleas state that the plaintiff had a black man and a black girl living in his family, who were slaves, and the property of the plaintiff, he having purchased the black man for \$200; and that the black girl died while a member of the plaintiff's family. The plaintiff's trafficking, and being the friend of slavery, is stated to consist in purchasing the black man, and having the black girl without stating how. The charge in the libel undoubtedly imputes to the plaintiff the habit of buying and selling slaves. Whether such a charge is libellous, it would not

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In *Service v. Heermance* (1 *Johns. Rep.* 91.) it was held, that a plea of a discharge under the insolvent act need not set forth, specially, all the proceedings previous to the certificate of discharge; that it was sufficient, if the discharge, itself, be set forth *verbatim*; all that was required was, to state enough to give the magistrate jurisdiction. In *Frary v. Dakin*, (7 *Johns. Rep.* 75.) where the same doctrine is recognized, it is said, "that after enough is alleged to give jurisdiction, the law presumes that the judge did his duty, and required those things to be done which were necessary." To apply these principles to the present case; I do not perceive that any of the exceptions are well taken; sufficient is stated to give jurisdiction. The plea says, the defendant was a resident of the county of *Columbia*; the act requires that the insolvent be an inhabitant. These words signify the same thing; a person resident is defined to be one "dwelling, or having his abode in any place:" an inhabitant, "one that resides in a place." There is no ground for this objection. The plea having stated all the facts necessary to give the magistrate jurisdiction, it will be seen that all the causes of special demurrer, truly stated, in point of fact, apply to the discharge set out in the plea. That they cannot be available, is evident, if the omission to state, in the discharge, every act required to be done by the statute, raises no presumption that the act was not performed, but that, on the contrary, we are to intend that the judge exacted a strict compliance with the statute.

The discharge states, that the recorder was satisfied that the defendant had conformed, in all things, to those matters required of him, according to the true intent and meaning of the act, before he directed an assignment. This allegation disposes of the first exception, independent of the presumption of law. The discharge would be directly falsified, if no advertisement had been published. Nor is the second exception well founded, in fact. The discharge states the manner in which the assignment was directed to be made, which pursues the words of the act; and, afterwards, that a certificate of the assignees was produced, that the insolvent had made such assignment; the fair construction of which appears to be, that the certificate complied with the statute. If, however, a strict construction is applied to the language of the discharge, it does not necessarily follow, that the certificate contained nothing more. What is stated is true, although the discharge may have omitted that part which related to the delivery of the property. This will be presumed, until the contrary appears, rather than that there was a neglect of duty, and an excess of jurisdiction.

The third exception is irrelevant. It does not appear that there were foreign creditors; and if there were, and not excepted in the discharge, it does not affect the defendant. The discharge may be a good bar to the plaintiff's demand, and not available as against foreign creditors.

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The fourth exception is frivolous. The discharge, if well pleaded, exonerated the person and estate, for the statute was in force when the contract was made.

It has been urged, that in no part of these proceedings is there a reference to the amended acts. When this petition was presented, one amendment had been made by sec. 6. ch. 263. sess. 30. which required insolvent notices, in certain cases, to be published in the city of *New-York*. I am not aware of any other. This amendment did not apply to a case like the present. The next amending act was passed *February 28, 1817*, and prior to the assignment being made, but subsequent to the order for publication. The rule of construction, applied in such case, is, that applications then pending, are not within its provisions. The act applies to petitions presented after the passing of the act. We are of opinion that the defendant is entitled to judgment on the demurrer, with leave to the plaintiff to amend.

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Judgment for the defendant.

GIBBS and others *against* BULL, late Sheriff of *Washington* County.

THE defendant was sued, as sheriff, for taking insufficient pledges, in an action of replevin; and for taking no pledges. The declaration contained four counts. The 1st, 2d and 3d counts were for taking insufficient pledges, and the fourth count was for not taking pledges. There were demurrers to the first, third and fourth counts, and an issue joined on the *second* count. Judgment was given for the defendant on the demurrers, and a verdict was given in his favor on the issue, and a judgment entered thereon.

Burr, for the defendant, now moved, that a writ of inquiry be awarded, to assess the damages sustained by the *defendant in the defence, and in consequence of the suit; and he moved, also, for *treble* costs, to be taxed, under the third section of the statute. (sess. 36. ch. 96. 1 *N. R. L.* 343.) (a)

Walworth, contra. He cited *Wait v. Durand*, 9 *Johns. Rep.* 264.

SPENCER, Ch. J., delivered the opinion of the court.

1. The defendant is not entitled to a writ of inquiry, for he has, in fact, sustained no damages, except the costs he has been put to. The *second* section of the act (sess. 24. ch. 47.) (a) does not apply to a case where the defendant is entitled merely to costs. This was so decided in the case of *Gardner v. The Trustees of Newburgh*.

But the defendant is entitled to double costs on the issues of fact. It is conceded that he is not entitled to double costs on the demurrers. It is said that the defendant is prosecuted for an act of *nonfeasance* merely, for not taking sufficient security on the

Where a sheriff was sued for taking insufficient pledges in replevin, and for taking no pledges; and there was a demurrer to one of the counts in the declaration, and issues joined on the other counts; and a judgment was given for the

[* 213] defendant, on the demurrer, and a verdict found for him on the issues, on which judgment was rendered; *Held*, that the defendant was not entitled to a writ of inquiry of damages, as he had sustained no damages, in the defence of the suit, except the costs: that he was not entitled to *treble* costs; but to single costs only, on the demurrer, and to double costs on the issues.

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replevin. He is sued for an act done *virtute officii*, to wit, for a misfeasance in office, for taking insufficient sureties. Misfeasance consists in doing what one ought to do, improperly; (1 *Tidd's Pr.* 5.) and in *Seely v. Birdsall*, (15 *Johns. Rep.* 269.) where the question was, whether the act done by the sheriff was done *virtute officii*, it was held, that when, in doing an act within the limits of his authority, he exercises that authority improperly, or abuses the confidence reposed in him by law, the statute extended to such cases. The court were then considering, whether the plaintiff was bound to prove that the cause of action arose within the county wherein it was laid, and, therefore, it was a direct construction of the act. In actions for negligent escapes, it might as well be said they were for nonfeasances. They are misfeasances, and the sheriff would be entitled to double costs.

The motion for a writ of inquiry is denied; and the defendant must have single costs on the demurrers, and double costs on the issues.

[* 214] *DE WOLF against THE NEW-YORK FIREMEN INSURANCE COMPANY.

Insurance, by the defendants, on a cargo, at and from New-York to Havana, and at and from thence to Lagaira and Porto Cabello, or either of them, at a premium of seven per cent., to return five and a quarter per cent. if the risk ended at H., without loss, or two per cent. if only one of the two other

THIS was an action on a policy of insurance, dated July 21, 1818, "on the cargo of the brig *George Washington*, at and from New-York to Havana, and at and from thence to Lagaira and Porto Cabello, or either of them, at a premium of seven per cent., to return five and a quarter per cent., if the risk ended at Havana, without loss, or two per cent., if only one of the two last-mentioned ports was used, and the risk should end without loss." It was an open policy, and subscribed for the sum of twenty thousand dollars, and was in the usual printed form, with a written note or memorandum subjoined, that the property insured was warranted by the assured to be *American property*.

The cause was tried at the New-York sittings, the 16th of December, 1820, before Mr. Justice Van Ness. It was proved that

and the risk ended without loss: warranted *American property*. The cargo, consisting of flour and pork, was purchased of the plaintiff, a native *American* citizen, residing in New-York, by L., a *Danish* citizen, of St. Thomas, then in New-York, under a contract entered into here, by which the plaintiff agreed to deliver the cargo to L., at Havana, or at Lagaira, or Porto Cabello, at five per cent. advance on the invoice, or cost, paid by the plaintiff, and the freight and premium of insurance, paid by the plaintiff. The cargo was consigned, by the plaintiff, to *Spanish* merchants, at Havana, (designated by L.) with instructions to dispose of the cargo, for the plaintiff's account, &c., or to send it to another market, that is, to a windward port. The bill of lading expressed, that the cargo was shipped for the account and risk of the plaintiff, to be delivered at Havana, to H & C. or their assigns, paying no freight, it being the property of the owner of the vessel: On the arrival of the vessel at Havana, the consignees interlined the bill of lading with the words "or a market;" and directed the master to proceed to Lagaira; and while proceeding to Lagaira, the vessel was captured, near that place, by a *Venezuelan privateer*, and carried into a port in the island of Margarita, and the vessel and cargo libelled in the Admiralty Court there, and the cargo condemned as prize, &c.

In an action on the policy to recover for a total loss: Held, that the cargo was and remained the property of the plaintiff, until its delivery at one of the ports mentioned; that there was no delivery, or acceptance of it, at Havana; and that the consignees there, in directing the master to proceed to L., acted as agents of the plaintiff, who continued to be, and was the owner of the cargo, at the time of its capture; and that, therefore, the warranty was complied with.

That such a contract of sale is legal and valid, both by the municipal law of this country, and by the law of nations, and does not destroy the *neutral* character of the property.

That the plaintiff was not bound to disclose to the defendants the fact and circumstances of the contract; for even if they were material, yet the insured is not obliged to communicate any fact, as to which there is a warranty, express or implied.

the plaintiff was a native *American* citizen, and before and at the time of effecting the insurance was, and still is a merchant, residing in the city of *New-York*: that in *July*, 1818, a negotiation was entered into between the plaintiff and *Moses E. Levy*, a merchant, resident at *St. Thomas*, but then in the city of *New-York*, about the *plaintiff's loading two vessels at *New-York*, on his own account, and delivering their cargoes at *Havanna*, *Laguira* or *Porto Cabello*, to be paid for by *Levy*, on their delivery. This negotiation resulted in an agreement, the terms of which were contained in two letters, each bearing date the 21st *July*, 1818. The first letter was from *Levy* to the plaintiff, as follows: "I am desirous of purchasing of you, deliverable in *Havanna*, *Laguira* or *Porto Cabello*, a certain quantity of beef, pork, flour, peas, &c., and will contract with you, on the following terms; for a cargo of beef, &c., to be shipped by the brig *Warrior*, and a cargo of flour, to be shipped by the brig *George Washington*, to *Havanna* or *Laguira*, I will pay you the amount of the costs and charges, including the costs of insurance which you shall pay thereon, and five per cent. advance on the amount of invoice, for your profit, together with one dollar per barrel, freight, if delivered at *Havanna*, or two dollars and fifty cents per barrel, if delivered at *Laguira* or *Porto Cabello*." The answer of the plaintiff to this letter was as follows: "I have received your letter, and I agree to your proposal to deliver you the cargoes of the *Warrior* and the *George Washington*, at *Havanna*, or a port to windward, at the cost and charges, as paid, and five per cent. advance on amount of invoice, together with one dollar per barrel, freight; and in case that one or both should go to *Laguira* or *Porto Cabello*, an additional freight of one dollar and fifty cents per barrel; fifteen running days to be allowed for discharging the cargoes at *Havanna*, and twenty-five running days for all ports if they proceed to windward." It appeared that *Levy* had made a contract with the intendant at *Havanna*, to supply the government at *Havanna*, *Laguira* and *Porto Cabello*, with provisions like those of the cargo of the *George Washington*; and for that purpose, he came to the *United States*, and made, among others, the contract with the plaintiff; but *Levy* did not communicate to the plaintiff, nor did the plaintiff know of the contract between him and the intendant of *H.* The *George Washington*, of which the plaintiff owned two thirds, and *Noah Pratt* the other third, was laden with a cargo of flour and pork, and the master, on the fifth of *August*, 1818, signed bills of *lading, stating that the plaintiff had shipped, &c. the flour and pork to be delivered at the port of *Havanna*, to *Hernandez and Chauviteau*, or their assigns, paying no freight, the same being the property of the owner of the vessel. The invoice which accompanied the cargo, stated that it was shipped by the plaintiff, on board the brig *George Washington*, for *Havanna*, for account and risk of the shipper, a citizen of the *United States*, and consigned to Messrs. *Hernandez and Chauviteau*. It appeared that *H. & C.* were the persons designated by *Levy* to be the consignees of the cargo at *Havanna*, and had his instructions relative to it, and to whom the cargo was to be delivered at *Havanna*, or

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was by them to be ordered to be delivered at *Laguaira* or *Porto Cabello*. Before the vessel sailed, the plaintiff addressed a letter of instructions to the master, signed by *F. G. Bull*, his authorized agent for the purpose, in which he directed him to proceed to *Havanna*, and on his arrival there, address himself to *Hernandez and Chauviteau*, who would either receive the cargo, or, if they thought best for his interest, would direct the master to proceed to some other market to windward; and if the brig was discharged at *Havanna*, he was to advise with *H. & C.* as to procuring the best freight for *Europe* or the *U. S. &c.* The plaintiff, also, wrote a letter to *Hernandez and Chauviteau*, which was delivered to the master, in which he mentions the shipment to them of the cargo of flour and pork, amounting to 17,853 dollars; and requesting them to receive and dispose of the same to the best advantage for his account; and that in case they thought it best for his interest, to send the vessel to any other market, that is, to windward, they might do so; but in that case, they must calculate that the cost of the flour would be augmented one dollar and fifty cents for freight, and eight per cent. for insurance. That the shipment was made by the advice of their mutual friend, *Mr. Levy*, and he hoped that it would prove satisfactory, and come to a good market. That in case the vessel discharged at the *Havanna*, they were requested to consult with the master, as to procuring a freight for *Europe* or the *U. S.*, preferring the latter; and to furnish the master with money sufficient to pay his expenses, and take his bill on the plaintiff *for the amount. If the vessel discharged at *H.*, and no freight could be procured for the *U. S.*, and a cargo of molasses, or part of a cargo, could be purchased at eight reals per keg, they were requested to make the purchase, after taking what freight could be obtained, drawing on him for the amount; and if no freight could be procured, he was willing to go as high as nine reals per keg for molasses. These letters were shown to *Mr. Levy* at the time they were written, and before they were delivered to the master.

The *G. W.* arrived at *Havanna* about the 10th of *September*, 1818, where she remained about two days, without delivering any part of her cargo. The letter addressed by the plaintiff to *H. & C.* was delivered to them; and they directed the captain to proceed with the vessel and cargo to *Laguaira*. While at *Havanna*, one of the clerks of *Hernandez and Chauviteau*, in the presence of Captain *Pratt*, inserted in the body of the bill of lading, after the words "port of *Havanna*," the words "or a market;" and the following endorsement was made on the same bill of lading: "Deliver the contents within to *Mr. Gerardo Patrullo*; ordered the brig to proceed, not finding a favorable sale of the cargo at *Havanna*.—*Havanna*, 11th of *September*, 1818. *Hernandez and Chauviteau*." Two letters were written at *Havanna*, by *Hernandez and Chauviteau*, one addressed to *Gerardo Patrullo*, at *Laguaira*, and the other to *Jose Beneto de Austria*, at *Porto Cabello*, both dated the 10th of *September*, 1818. A translation of the first letter was as follows: "The American brig *George Washington*, Captain *Noah Pratt*, has just arrived here with a cargo of flour and pork, consigned to us by *Mr. James De Wolf, jun.* Being unwill

ling to detain her here, on account of the low prices of those articles, we send her to the *Spanish Maine*, in search of a better market; and in the event of her arrival at your port, permit us to recommend to you her captain, Mr. *Noah Pratt*, whom we have furnished with your address. If the flour and pork can be disposed of, in any way, at your place, that circumstances will permit, it will not be for the interest of our friend, Mr. *J. De Wolf*, to let the vessel return to the *United States* in ballast. In case you should be under the necessity *of taking bills in payment for the flour, in that event, we open with you a credit in the sum of ten thousand hard dollars, to be invested in hides and other articles that may yield a freight; authorizing you to draw for the above sum of 10,000 hard dollars, on account of Mr. *James De Wolf*, jun, merchant, of *New-York*, which drafts will be duly honored, and for the punctual payment whereof we hold ourselves responsible." "P. S. The credit for the 10,000 dollars will not be resorted to, unless no freight can be had for the brig." Signed "*Hernandez and Chauviteau*." The other letter, addressed to *Jose Beneto de Austria*, at *Porto Cabello*, was the same in substance. These letters were delivered to Captain *Pratt*. The brig sailed from *Havanna* about the 12th of *September*, 1818, and on the 12th of *October* following, was captured, in sight of *Laguira*, by the schooner *Brutus*, a private armed vessel of the republic of *Venezuela*, and carried into the port of *Juan Griego*, in the island of *Margarita*, where she arrived on the 19th of *October*. The vessel and cargo were both libelled in the Vice-Admiralty Court of that island; and on the 24th of *October*, the cargo was condemned as good prize, and the vessel acquitted. (a) On receiving information *of the capture, the plaintiff abandoned the cargo to the defendants, and claimed a total loss.

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(a) The sentence of condemnation (which was translated) is dated at *Villa del Norte*, the 24th day of *October*, 1818, and in the eighth year of the republic of *Venezuela*, and declared as follows: "That, having carefully examined the documents which *Noah Pratt*, captain of the said vessel, has exhibited, it is found, that she, and the cargo, came from *New-York*, and belonged to *James De Wolf*, jr., who consigned the same to Messrs. *Hernandez and Chauviteau*, in the island of *Havanna*; but observing, on the other side, that from thence she was despatched, for the account and risk of those persons, to *Laguira*, the said cargo being consigned to *Don Gerardo Patrullo*, or to *Porto Cabello*, to *Don Beneto Austria*, as property belonging to *Hernandez and Chauviteau*, as is proved by the endorsement on the back of the bill of lading, and the words 'or a market,' which are surreptitiously inserted; by the letters, in which appears a bill of exchange of ten thousand dollars, upon *Patrullo and Austria*, for her return, and a special recommendation respecting the cargo, all of them being acts without the orders, and done when out of the reach of *James De Wolf*, jr., by *Hernandez and Chauviteau*, and by the clerk of the house, as the said Captain *Pratt* declares, when the said bill of lading was produced to him; all which is corroborated by the deposition of *Henry Wilson*, chief mate of the said *George Washington*; so that on all sides the truth is discovered, that the cargo that she had on board was the property of *James De Wolf*, jr., until she arrived at the port of *Havanna*, and then commenced to be that of Messrs. *Hernandez and Chauviteau*, by whose orders, and not by those of *James De Wolf*, it was exposed to the perils of the sea, and otherwise, as far as *Laguira*, or *Porto Cabello*, no instructions appearing for the purpose, from the former owner, or consignor; nor does his signature appear, but only that of another person, whom *Noah Pratt* asserts to be employed in the house of *De Wolf*, and to have signed on account of his absence; but it may be very well collected that this is a fiction of the clerk of *Hernandez and Chauviteau*, to give to the *Spanish* property the appearance of *American* property: Wherefore, this court being persuaded, that as well for the reasons stated, as for having broken the law of blockade of introducing into the ports prohibited articles, the condemnation of the cargo will not be an infringement or violation of the rights of the *American* nation, respected by the chiefs of the republic of *Venezuela*: the court determine and declare as a good prize, the cargo of flour and meal which the *G. W.* was carrying to the enemy's ports: liberates the vessel, &c.; that, on payment of corresponding duties, taxed costs, and the freight to the captured captain, the said cargo be delivered to the captor for his own use."

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A verdict was taken for the plaintiff, for twenty-five thousand dollars, subject to adjustment, and to the opinion of the court, on a case as above stated: and either party was to be at liberty to turn the case into a bill of exceptions or special verdict.

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Wells, for the plaintiff. 1. Has the warranty of *American* property been complied with in this case? The contract between the plaintiff and Mr. *Levy* was a valid contract at common law, and by the law of nations; most certainly, in a state of peace. But it will be objected, that as war existed between *Spain* and her colonies, this is to be considered and treated as a contract in time of war. Sir *William Scott*, in the case of the *Packet de Bilbao*, (2 *Rob. Adm. Rep.* 133.) admits, that in time of peace, there would be nothing unlawful in the consignor taking upon himself the whole risk of the goods, until delivered to the consignee. But, "in time of war," he says, "this cannot be permitted, for it would at once put an end to all captures at sea;" because it would be a contrivance resorted to, for the purpose of protecting property from capture, "in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture." And because it *may* be used as an instrument of fraud, he comes to the very illogical conclusion, that it, therefore, is to be considered as an invalid contract in time of war; thus applying a rule of evidence *to interpret a contract, in order to render it void. Nay, he puts the doctrine on a more fanciful ground; that as the consignee has a right to receive the cargo, the captor, "having all the rights that belong to his enemy," has the right to take possession of it, and his possession is equivalent to a delivery to the consignee. If the captor, in succeeding to the *rights*, succeeded, also, to the *duties* of the consignee, this reasoning might be plausible; but when the payment by the consignee is to depend on the delivery of the goods to him, it is not easy to perceive how the possession by the captor, who *does not pay*, is equivalent to a delivery to the consignee. Indeed, the learned judge is sensible of the fallacy of such reasoning, and is obliged to suppose that the consignor has, in his bargain with the consignee, guarded against the *loss by capture*; or, if he has not, that "he has acted improvidently, and without caution." Sir *William Scott* cites no authority whatever for this doctrine; and it is, manifestly, not supported by principle. In the first place, it infers the illegality of a contract, from the mere circumstance that it may be fraudulent. To consider a shipment, under such circumstances, as *prima facie* evidence of a fraud on belligerent rights, would be going far enough; but to pronounce a contract unlawful, because it may be abused for such a purpose, is unsound. A neutral may put his property, *bona fide*, on board of a belligerent vessel, or even an armed ship of the enemy, to be carried to the belligerent country; and it is not, therefore, to be treated as enemy's property; though this would be liable to great abuse and distrust. (*The Nereid*, 9 *Cranch*, 388 *The Atalanta*, 3 *Wheat. Rep.* 417.)

In the next place, this doctrine is inconsistent with the other and better reasoning of Sir *William Scott*. in the same case; where

he says, "The goods are sent at the risk of the shipper. If they had been lost, on whom would the loss have fallen, but on him? What surer test of property can there be than this? It is the true criterion of property, that if you are the person on whom the loss will fall, you are to be considered as the proprietor." If this be so, where a contract is made in time of peace, there is no authority or principle which will support the position, that such a contract *is invalid in time of war. With the exception of blockaded ports, and articles contraband of war, the right of the neutral to make contracts with the belligerents, remains the same as in a state of peace. If his contract to deliver goods to an enemy is fraudulent, in fact, and not at his own risk, but used as a mere cover to protect the property of a belligerent, it ought to share the fate of belligerent property. If, however, the contract is *bona fide*, it is an unlawful restraint on the rights of a neutral to pronounce it illegal.

Again: It is said, the property is good prize, because, on delivery, it would belong to the belligerent, and the captor succeeds to his rights; that is, the right of receiving. But from whom does the captor receive it? From the neutral. And whose property is it, until the capture? The neutral's. Its character can only be changed by a delivery to the enemy. It is, then, captured as neutral property.

In the case of the *Atlas*, (3 *Rob. Adm. Rep.* 299, 300. *Sally-Griffiths*, in the note,) it is again laid down as the doctrine of the prize court, that contracts of purchase effected by a belligerent, but the payment contingent, depending on the delivery of the property, which remains at the risk of the neutral, though lawful in peace, are unlawful in war, and if taken *in transitu*, the property is to be condemned as enemy's property. Will this court adopt such a doctrine, and apply it to a contract between two of our own citizens?

In the case of *Ludlow v. Bowne and Eddy*, (1 *Johns. Rep.* 1.) this court reviewed the doctrine of the British Prize Court, and refused to adopt it; and the decision in that case has been the law of this state since *February*, 1806. The present chancellor, though he differed from the other judges, did not rest his opinion on the doctrine of Sir *William Scott*; but thought the agreement, in that case, fraudulent in fact.

In the case of the *Venus*, (8 *Cranch*, 275.) Mr. Justice *Washington* says, "To effect a change of property, as between seller and buyer, it is essential that there should be a contract of sale agreed upon by both parties; and if the thing agreed to be sold, is to be sent by the vendor to the *vendee, it is necessary to the perfection of the contract, that it should be delivered to the purchaser or to his agent, which the master, to many purposes, is considered to be." In the case of the *Frances*, (8 *Cranch*, 418.) he says, "When goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee." In the case of the *Jose In diano*, (1 *Wheat. Rep.* 208.) Mr. Justice *Story* says, "In general, the rules of the prize court, as to the vesting of property, are the

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same with those of the common law, by which the thing sold, *after the completion of the contract*, is properly at the risk of the purchaser." But, until the vendor "has done some notorious act to divest himself of his title, or has parted with the possession, by an actual and unconditional delivery, for the use of the vendee, no property in the goods vests in him."

2. Then was the plaintiff bound to communicate to the defendants the contract under which the cargo was shipped? It is not necessary to communicate or disclose any thing, for which the insured undertake by a warranty, express or implied. (*Marshall on Ins.* 475. *Shoolbred v. Nutt*, S. C. *Park*, 229.) The representation is merged in the warranty. If the defendants, not relying on their warranty, had asked for information, and the plaintiff had communicated what was not true, that might be a ground of defence. The case of *Haywood v. Rodgers* (4 *East*, 590.) very strongly illustrates the rule on this subject.

D. B. Ogden and S. Jones, contra. 1. The cargo, upon its shipment in *New-York*, became the property of *Levy*, by delivery, and was not, therefore, *American* property. *L.* was the agent of the *Spanish* government, and made the purchase here. A delivery to him, was, in truth, a delivery to the *Spanish* government. He was to bear the costs and charges attending it, and to pay for the insurance; the cargo was at his risk. The letter of instructions to the captain does not forbid the delivery of the cargo, without payment; nor is he enjoined to demand payment of the purchase-money. It is evident, that the contract of sale was consummated here, and that the payment for the cargo was not to *depend on its delivery at the ports mentioned. In the case of *Ludlow v. Bowne and Eddy*, the vendee was to give a bill of sale with a *guaranty*, and, until that was done, the goods were not to be delivered. Here, if the goods had never been delivered at *Havanna*, or *Laguaira*, or *Porto Cabello*, they must have been regarded as belonging to Mr. *Levy*.

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Again: The vessel arrived at *Havanna*, and the agent of Mr. *Levy* altered the bill of lading, directing the delivery at *Havanna*, or a market, and ordering the master to proceed to *Laguaira* or *Porto Cabello*; thus exercising complete ownership and control over the property. The master was instructed to deliver the property to the agent of Mr. *Levy*, not to the agent of the plaintiff. At and from *Havanna*, then, the property ceased to be *American*.

The counsel for the plaintiff has criticized the doctrine of the prize court, as laid down by Sir *William Scott*. But it is a doctrine which, on examination, will be found sound and well founded; a doctrine, without which, no belligerent could maintain his rights, or repel the secret attacks of war in disguise. Nothing can be added to the learned, luminous and cogent reasoning of Sir *William Scott* on this subject. And this country, whenever it becomes belligerent, will be compelled to adopt it, as indispensable to the maintenance of its rights. In *Ludlow v. Bowne and Eddy*, the cases cited from the admiralty were not touched by the

court, but considered as inapplicable to the state of facts presented in that case.

2. Every fact which may vary or enhance the risk, ought to be disclosed to the insurer. It is enough, that a belligerent prize court would have considered this contract, no matter whether rightfully or wrongfully, as affecting the neutrality of the property. If so, it must enhance the risk. The insured is bound to communicate every species of intelligence which he possesses, which may influence the insurer in deciding whether he will insure at all, or what premium he will ask for making the insurance. (*Durell v. Bederley*, 1 *Holt's N. P. Rep.* 283—287. notes.)

Again: The facts in this case show, most clearly, that this was a cover for *Spanish* property, and that the plaintiff *knew that he was covering belligerent property. The letter from the plaintiff to *Hernandez and Chauviteau* was false throughout, if Mr. *Levy* was to be the owner of the cargo on its arrival at *Havanna*. The fact is, that *Levy* was an agent, sent out to purchase supplies for the *Spanish* government, and the plaintiff must be presumed to have known the fact.

3. The property was condemned by a competent court of admiralty, for a breach of blockade; and, although the sentences of foreign courts of admiralty are not held to be conclusive in the courts of this state, as to contracts between our own citizens, yet, [Here the counsel was stopped by the *chief justice*, who said, that the doctrine on that subject had been so long and so definitively settled, that it was not now to be questioned.]

T. A. Emmet, in reply, said, that the case of *Ludlow v. Bowne* was quite decisive of the present case, which is, indeed, stronger in favor of the plaintiff. The delivery of the goods was a condition precedent to the payment. They were put on board the plaintiff's own vessel, and under the care of his own master; they were, therefore, in his own possession, and under his own control. The action to deliver or not, was to be made at *Havanna, Lagaira, or Porto Cabello*.

Again: The treaty between *Spain* and the *United States* declares, that free ships make free goods; and it would naturally be supposed that the *Spanish* captors would adhere to that article, until it had been otherwise declared. Even according to the reasoning of *Sir William Scott*, there can be no fraud, unless the party knew that he was dealing with an enemy, and intended to cover his property. Now, the case states that the plaintiff did not know of the contract between *L.* and the *Spanish* government at *H.* Suppose the cargo had been lost by perils of the sea, who would have borne the loss? Surely, it must have fallen on the plaintiff, or his insurers. The cause or mode of loss can make no difference in the construction of the warranty. If the property had been warranted *neutral*, then the court must have looked to the law of nations, to ascertain what constituted its neutral character. But when the warranty is that it is *American* *property, they must look to the municipal law of our own country, to determine its *American* character. A warranty is to be construed according

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to the plain commercial import of the terms, among mercantile men. (*Marshall on Insurance*, 347. a.)

As to the alleged concealment, the answer is, that it is a matter covered by the warranty. A concealment, to vitiate the policy, must be fraudulent, and the fact of its being fraudulent must be found by a jury. (*Duguet v. Rhineland*, 1 *Caines's Cases in Error*, 27. S. C. 2 *Johns. Cas.* 476. *Hallet v. Jenks*, 1 *Caines's Cases in Error*, 43—47.) The jury have not passed upon the fact, and the court cannot draw the conclusion. But as *Levy* was a *Dane*, and his rights precisely the same, in regard to belligerents, as those of the plaintiff, it could not have varied the risk, or the premium, had it been stated that he was the owner. (*Le Roy v. The United Insurance Co.* 7 *Johns. Rep.* 343.)

SPENCER, Ch. J., delivered the opinion of the court.

This case gives rise to three questions; 1st. Was the delivery of the cargo at one of the three ports, *Havanna*, *Laguaira*, or *Porto Cabello*, at the election of *Levy*, a condition precedent to the plaintiff's right to demand payment of the stipulated price, according to the contract; or was the sale consummated here? 2d. Was the transaction a cover, and did the plaintiff know that the cargo was for the *Spanish* government? 3d. Was it necessary for the plaintiff to disclose to the defendants the circumstances under which the property was shipped, even if the risk was enhanced?

The contract on the part of the plaintiff is to deliver the cargo at one of the designated places; and it is perfectly clear that the election at which of the ports *Levy* would receive it, was in him. This right of election, to receive the cargo at *Laguaira* or *Porto Cabello*, might be made and signified to the plaintiff at *Havanna*, and so it was understood by the parties to the contract. The policy speaks the same language. The cargo is insured from *New-York* to *Havanna*, and at and from thence to *Laguaira* and *Porto Cabello*, or either of them, at a premium of seven per cent., to return five and a quarter per cent., if the risk ended at **Havanna* without loss; thus making *Havanna* a port to which the vessel was to go, at all events, and leaving it optional with the assured to proceed to one or both of the other ports. The contract is to purchase and sell, deliverable in *Havanna*, *Laguaira* or *Porto Cabello*. The risk of delivery rests on the vendor, and the purchase is incomplete, unless the cargo be delivered at one of the appointed places, to be elected by the vendee. As an indemnity for the risk to be incurred by the vendor, he was at liberty to procure insurance, which, in the event of the delivery, was to constitute part of the price of the cargo; and in the event of a loss, by the perils insured against, the vendor would find his indemnity in the insurance. Until, then, the plaintiff had performed his part of the contract, by delivering the cargo at one of the designated ports to be elected by *Levy*, the property never became vested in *Levy*, and the plaintiff never could recover the price, and consequently it remained the plaintiff's property. Such a contract, Sir *William Scott*, in the case of the *Packet de Bilbao*, (2 *Robinson*, 111.) considered lawful in time of peace, but as illegal in time of

war, and as a fraud on the belligerent, because it went to protect property *in transitu* to the enemy, and as it deprived the belligerent of his right of capture.

It was urged on the argument, that the cargo was received by the consignees at the *Havanna*, and that thenceforth the property ceased to be the plaintiff's. The vessel merely reported herself there to *Hernandez and Chauviteau*, to whom she was addressed; she remained there but two days, and never broke bulk; and then, by their directions, as agents to *Levy*, proceeded to *Laguaira*. Nothing like an acceptance of the cargo at *Havanna* is perceived in these acts; but, on the contrary, an election not to receive the cargo there. It has also been insisted, that as the cargo was consigned to *Hernandez and Chauviteau*, and was not to be sold, what they did, and particularly the alteration in the bill of lading, was equivalent to an acceptance. It was shown, most satisfactorily, by the late Ch. J. *Thompson*, in the case of *Ludlow v. Bowne and Eldy*, (1 *Johns. Rep.* 1.) that the consignment was open to explanation, whether made to the consignees, on the account and risk of the consignor, or on their account and risk. *Hernandez and Chauviteau* were also the agents of the plaintiff, in the event that they did not, as the agents of *Levy*, accept the cargo at *Havanna*; and, as such agents, they had a right, after electing not to accept the cargo there, with the assent of the captain, to alter the bill of lading in the manner they did, without compromising the rights of either party. It was a necessary and an innocent act.

We come back to the question, whether the contract between the plaintiff, an *American* citizen, and *Levy*, a resident merchant at *St. Thomas*, was so far unlawful, as to subject the cargo to capture as *Spanish* property. The case of *Ludlow v. Bowne and Eldy* decides this case; and it is impossible to distinguish the two cases. In both, the property insured, was warranted to be *American* property. There, the cargo was shipped by the plaintiffs under an agreement with merchants in *France*, whereby the plaintiffs were to deliver the goods at *St. Vallery*, for which they were to be allowed eight per cent. commissions, taking upon themselves all risk, expressly including a premium for sea risks as well as war risks; the consignees to pay freight on the delivery, and also for the amount of cargo, in bills on *London*, guarantied by a commercial house in *London*. The goods were captured *in transitu*, by the *British*, and condemned as *French* property. This court decided, that the goods remained the property of the consignors, and that the warranty was complied with. A majority of the court were of opinion, that the goods remained the property of the plaintiffs, until their delivery at *St. Vallery*. In that case, we held, that there was a right to withhold the delivery of the goods until payment had been made according to the contract; and here, by the express stipulation of the parties, the plaintiff can have no right to demand payment, until he has performed the condition precedent, the delivery of the goods according to the contract; so that, in both cases, there was no change of property.

The decisions of Sir *William Scott*, in the Admiralty Court, were then pressed upon our attention; but we regarded them as the

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result of political expediency, and as evincing a determination in the *British* councils, to destroy *all commerce with their enemy, rather than as rules of international law. We adopted the broad and just principle, that a neutral had a right, and was justified by the law of nations, in supplying belligerents, with the sole exception of contraband goods, and going to a blockaded port. How can the existence of a state of war between *Spain* and her colonies, not then recognized by the rest of the world as independent states, or how can the existence of war between *Spain* and *Venezuela*, under any circumstances, affect such a contract, or render it unlawful? The warranty in the policy, that the property was *American*, means that it was so by the law of nations. If the contract would be a legal one in time of peace, which Sir *William Scott* expressly admits, and if the property would be deemed the plaintiff's until actual delivery at one of the elected ports, what would vitiate this contract, or make the property the vendee's before the performance of the condition precedent, according to the law of nations? Certainly not because there was a war between *Spain* and *Venezuela*; for I trust that this country never will permit the great principle, that a neutral may carry on commerce with a belligerent, during war, as well as in peace, with the exceptions already mentioned, to be infringed or abandoned. In the case referred to, we meant to dissent from the principles advanced by Sir *William Scott*, which go to consider all property bound to an enemy's country, as belonging to the enemy, and as exposed rightfully to capture and condemnation. We meant to consider that rule as an arbitrary one, forming no part of the international code, and as entirely destructive of neutral rights. Subsequent reflection has served to strengthen the opinion I held in that case; and it has led to a conviction that the doctrines advanced by that eminent judge, in the *British* admiralty, were the result of power forgetting right, and the offspring of state policy, created for the occasion.

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As to the alleged concealment, or non-disclosure by the plaintiff, that the cargo was intended by *Levy* for the *Spanish* government, the case definitively settles the point; for it is admitted by the defendants, that the plaintiff did not know that *Levy* had contracted with the intendant at **Havanna* to supply the *Spanish* government with flour and provisions; and that he did not know that the cargo, on its arrival at its port of final destination, would have been applied by *Levy* to the performance of his contract.

But it is urged, that the facts and circumstances of the contract should have been disclosed, as the risk was materially enhanced. If it be conceded, that those circumstances did enhance the risk, the answer is decisive, that a party need not communicate any thing with respect to a fact, in regard to which there is an express or implied warranty. As to the conclusiveness of the sentence of condemnation, we are not at liberty to question the doctrine on that point, which has been definitively settled in the Court for the Correction of Errors, and has been so long acquiesced in. There must be judgment for the plaintiff, according to the stipulation in the case.

Judgment for the plaintiff

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HOLMES and others against REMSEN and others, Executors of CLASON.

THIS was an action of *assumpsit*, brought by the plaintiffs, as trustees, &c. of *Frederick Mullett*, an absent debtor, against the defendants, as executors of *Isaac Clason*, deceased. The declaration contained the usual money counts, and on an account stated between *Clason* and *Mullett*, alleging the promise to be by *Clason* to *Mullett*. There were other counts, which stated the promise to be from the defendants to *Mullett*; and similar counts, stating the promise to be from the defendants to the plaintiffs. The defendants pleaded the general issue, and, by a written agreement, the attorneys of the parties stipulated that, on the trial of the cause, the following facts should be admitted as *proved: *Isaac Clason*, of the city of *New-York*, a merchant, died in *February*, 1815, and the defendants are his executors. C., at the time of his death, was indebted to M., on the balance of an account, two thousand six hundred and sixty-five pounds, one shilling and ten pence, sterling, and which was never paid to M., or the plaintiffs. After the said sum became due and payable, M., on the 14th of *February*, 1815, became, and was duly declared a bankrupt, according to the laws of *England*; and, on the same day, an assignment of all his personal estate and choses in action was duly made, by the commissioners named in the commission of bankrupt, to *Henry Page*, in trust, for the creditors of M. On the 25th of *February*, 1815, the commissioners and *Henry Page* assigned all the personal estate, and choses in action of M., in the manner prescribed by the laws of *England*, to three assignees, named. On the 26th of *February*, 1815, M., in consideration of ten shillings, assigned to the same three assignees, "all the debts, personal estate, and effects, whatsoever, of him, F. M., not being, arising or growing within *England*, which he was entitled to, or possessed of, or which any other person or persons were possessed of, or entitled to, in trust for him," in trust, for the same purposes mentioned in the former deeds of assignment.

F. M. is a natural born subject of the king of *Great Britain* and *Ireland*, residing in *London*, where he has been a merchant for above twenty years. On the 7th of *August*, 1816, a warrant was issued under the act entitled, "An act for relief against absent and absconding debtors," (1 N. R. L. 157. sess. 24. ch. 41.) (b) to attach the estate of F. M. in this state, of which notice was duly published on the 8th of *August*, 1816; and on the 27th of *August*, 1817, the plaintiffs were duly appointed trustees for all his creditors, pursuant to the act.

In the life-time of *Clason*, a ship, called "*The Star*," belonging to him, was libelled and condemned in the Admiralty Court at *Halifax*, *Nova Scotia*; and he appealed from the sentence of con-

Payment by a garnishee, under a judgment and execution on a proceeding by foreign attachment in the Lord Mayor's Court of London, of a debt due by a citizen in New-York, to a creditor in London, being compul-

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sory, is a good bar to an action brought here against the debtor, under the act giving relief against absent and absconding debtors; though the attachment here, against the absent debtor, was issued before the money of the debtor came into the hands of the garnishee, or even before the foreign attachment issued in *England*. (a)

(a) Vid. *Abraham v. Plestoro*, 3 *Wendell's Rep.* 538. *Andrews v. Herriot*, 4 *Cow. Rep.* 503, and note a to same case, page 521. *Sirgeant, Law of Attachment*, 145.

(b) : *Rev. Stat.* 3.

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demnation to the High Court of Admiralty in *England*, and appointed Messrs. *Baring, Brothers & Co.* of *London*, his agents, to prosecute the appeal. The appeal *was pending when C. died, and the defendants appointed *Baring, Brothers & Co.* their agents, in regard to the appeal. On the 21st of *May*, 1818, *Baring, Brothers & Co.*, with the approbation of the defendants, compromised the appeal, and received from the captors of the ship a large sum of money, for the use of the defendants. In *October*, 1818, the assignees of *Mullett*, as a bankrupt, pursuant to law and the custom of *London*, procured an attachment to be issued out of the Lord Mayor's Court of that city, by virtue of which, the sum of £3,167 sterling, money of the defendants, was attached in the hands of *Baring, Brothers & Co.*, and by regular proceedings thereupon, judgment was rendered in the Lord Mayor's Court, in favor of the assignees, for £3,024 1s. 6d. sterling, of the moneys of the defendants in the hands of *Baring, Brothers & Co.*; and on the 1st of *February*, 1819, the assignees of M. had execution for that sum, and *Baring, Brothers & Co.* were compelled to pay that amount to the assignees.

The cause was tried at the *New-York* sittings, before Mr. Justice *Platt*, on the 12th of *April*, 1821, when a verdict was taken, under the direction of the judge, for the plaintiffs, for 17,095 dollars and 4 cents, subject to the opinion of the court, on a case containing the above facts.

Caines, for the plaintiffs, contended, 1. That the commissioners' assignment, under the *English* statutes of bankrupts, was merely a statutory transfer, under the municipal law of *Great Britain*; and was, therefore, inoperative and void, as against an *American* citizen, an attaching creditor of the bankrupt, residing in the *United States*. It is not denied, as a general rule, that the personal property follows the domicile of the owner; but it is not correct as a universal proposition. (*Harvey v. Richards*, 1 *Mason's Rep.* 431. Per *Story*, J.) We claim the benefit of the exception to the general rule; that whenever a citizen of the country where the property is situated, has a debt or demand against the owner of it, who is domiciled in another country, the property has, in that respect, a *situs* or locality, and does not follow the domicile of the owner, but is to be regarded as the representative or substitute of the owner. Under the *operation of the laws of this state, allowing attachments against the property of absent or absconding debtors, the personal property of the debtor is local. Property is merely an incident of the person; and if the person himself was now here, he could not protect himself against the claim of the plaintiffs, by alleging that his domicile was in another country. So, neither can his property, which, in regard to his creditors here, is the substitute of his person, be protected by such plea. Where a person dies in a foreign country, possessed of property here, the distribution is to be made among the legatees, or those claiming as heirs, by succession, according to the law of the place of the testator's or intestate's domicile; but, if there are creditors here, they are to be paid according to the law of the place where the property is found. (*Selectmen of Bos-*
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son v. Boylston, 4 Mass. Rep. 318. *Richards v. Dutch*, 8 Mass. Rep. 506.) The Supreme Court of *Massachusetts*, in the cases cited, make a distinction between the law of distribution, and the law of payment. In the case of *Bird and others v. Pierpont*, (1 Johns. Rep. 118.) *Spencer J.*, says, "that this court will not suffer the discharge of an insolvent, under the laws of the state where he is domiciled, to operate against a creditor who resides without the state, and whose debt was contracted elsewhere." (*Van Raugh, v. Van Arsdaln*, 3 Caines's Rep. 154.) And, "if we will not take notice of the act of insolvency, under such circumstances, in favor of the insolvent, whose whole property has been divested to satisfy his creditors, surely we cannot notice the bankruptcy in *England*, to defeat the recovery of a debt indisputably just."

Should it be said, that the attachment here ought to have issued against the assignees of *M.*, and not against the executors of *C.*, we answer, that executors and administrators are *personal representatives*; but assignees are not. As *nemo est heres viventis*, so, a person living has no personal representatives. The assignees cannot sue in their own names, for foreign debts. (*Bird v. Caritat*, 2 Johns. Rep. 345.)

Relying on the *exception* which has been stated, we shall proceed to show, that the cases which will be relied on, in *support of the general rule, are not applicable to the present case; and this, *first*, from the cases themselves; *second*, from the admissions of the counsel, and of the judges before whom they were argued and decided. It must be kept in view, that this is the case of an *American* citizen, claiming from an *American* citizen, in an *American* court, the benefit of an *American* statute, as to property within the *United States of America*, against the pretended bar of an *English* statute, set up in favor of *English* subjects.

First; Captain *Wilson's* case, cited in 1 H. Bl. 691, and *Neale v. Cottingham and Houghton*, cited in 1 H. Bl. 132. note. *Stein's* case, or *The Bank of Scotland and others* against *Cuthbert and others*, (1 Rose's Cases in Bankruptcy, 201. 462. Appendix.) *Selkirk v. Davies*, (2 Rose's Cases, 97. 291. S. C. 2 Dow's Rep. 230.) *Hunter v. Potts*, (4 Term Rep. 182.) *Phillips v. Hunter*, (2 H. Bl. 405.) are all cases between *British* subjects, claiming within different parts of the *British* empire, (some in *Scotland* and some in *Ireland*,) against the right of *British* assignees, under an *English* commission of bankrupt. The case of *Sill v. Worswick* (1 H. Bl. 665.) was not only a case between *British* subjects, but where "goods and specific effects," as found by the special verdict, were claimed by a *British* subject, who commenced his proceedings for the recovery of them in *England*, against *English* assignees, under an *English* commission. The case of *Solomons v. Ross* (1 H. Bl. 131. note) is acknowledged by *Eyre*, Ch. J., and by Chancellor *Kent*, (4 Johns. Ch. Rep. 475.) on the facts stated, to be an erroneous decision. The case of *Jollet v. Deponthieu* (1 H. Bl. 132. note) was not only not a decision on the question, but having, as *Eyre*, Ch. J., observed, eventuated in an injunction, "was strongly urged as confirming what it prevented." *Secondly*. These cases are admitted by

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British counsel and *British* judges, not to be applicable to a case like the present, or between foreigners. In *Hunter v. Potts, Law*, for the plaintiff, says, "By the decisions, the operation of the bankrupt laws on property situated in other countries, is fully established, at least, against those who are subject to the dominion of our laws." Again; he says, "From a review of the *authorities, it appears, that however the question may be as between subjects of this country and foreigners residing in the country where the bankrupt's property lies, yet, as between subject and subject in this country, the courts will not sustain acts done by them in direct contravention to the policy of the laws to which they owe obedience." In the same case, Lord *Kenyon* observes, "It must be remembered, that during the progress of the business, all these parties resided in *England*." And in *Phillips v. Hunter*, (2 *H. Bl.* 405.) Ch. J. *Eyre*, says, "All these facts appearing on the record, this case must be argued as arising between *English* subjects, upon *English* property." In *Sill v. Worswick*, (1 *H. Bl.* 689.) Lord *Loughborough* says, "It is not a question whether the bankrupt laws have any operation in *St. Christopher's*, but whether they operated at *Lancaster*," the place where *Worswick* resided, and from whence he went to *London* to make his affidavit before the lord mayor, to ground his proceedings.

A few *dicta* of *English* judges may be adduced by the defendant's counsel, in support of the general proposition; but they were extrajudicial opinions, and the result of *British* policy. For it is the policy of *Great Britain* to extend the operation of bankrupt laws. Being the greatest commercial nation on the earth, the property of her subjects is diffused throughout every portion of the globe. She credits much more than she is debited. Under domestic commissions, she will collect from all quarters of the world; under a foreign commission, she would pay in a few instances only. To allow, therefore, of that comity of which her judges speak, or, in other words, to abrogate foreign attachments, in favor of *English* commissions of bankrupt, would be to enable her to collect much and pay little.

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The cases which have been cited, decide, that against an *English* statute of bankrupts, in an *English* court of justice, an *Englishman* cannot set up, against an *English* claim, an *American* attachment law. Now, we say, that, on the same principle, against an *American* attachment law, in an *American* court of justice, an *American* citizen cannot set up, against an *American* claim, an *English* statute of bankrupts. The same rule must operate on both sides. The *same principle which decided in *British* courts, in favor of *British* assignees, under a *British* commission, must decide in favor of *American* trustees, under the *American* attachment law. This is admitted by the eminent *English* counsel who argued in the cases cited. Thus, *Bower*, in the case of *Hunter v. Potts*, (4 *Term Rep.* 100.) says, "If a subject of *Rhode Island* had been a creditor of the bankrupt, and had, even after the commission issued here, attached property of the bankrupt there, it is not to be supposed, that the courts of law would have turned him round, to seek his remedy under the commission in this country."

Again, (*ib.* 191.) he says, "It is, also, worthy of consideration, that if transactions of this nature can be overhauled, the subjects of this country will be put in a more disadvantageous situation than *foreign creditors, who will be at liberty to attach the bankrupt's property abroad*, to the prejudice of our subjects, and without any benefit to the bankrupt's estate." Thus, the right of foreign creditors to attach the property of an *English* bankrupt, in opposition to the *English* commission, is admitted, and was never contradicted. So, Ch. J. *Eyre*, in *Phillips v. Hunter*, (2 *H. Bl.* 412.) says, "It was well said in the argument, you admit that an *American* might, in this case, have pursued his legal diligence, in the courts of his own country, notwithstanding our bankrupt laws, and that you could not have taken the money recovered from him, and given it to the assignees." Though the other judges differed from *Eyre*, Ch. J., on the question, whether they could take the money from the *English* creditor, and give it to the assignees of the bankrupt; yet none of them hinted even a doubt of the right of the *American* creditor, under the attachment law of his own country, against the *English* assignees under a *British* commission. Lord *Kenyon* himself (4 *Term Rep.* 192.) limits the general proposition contended for by the defendants, to cases, where it is "uncontradicted by the laws of any other country." In *Quin v. Keefe*, (2 *H. Bl.* 553.) *Le Blanc*, *arguendo*, said, "There is no instance of a certificate, or any thing analogous to it, in a foreign country, being allowed to be a bar to the recovery of a debt contracted in *England*." And *Eyre*, Ch. J., says, "I agree with the distinction made by my brother, *Le Blanc*, between the cases of a debt contracted in a foreign country, and here." In *Stein's* case, (1 *Rose's B. C.* 482.) Lord *Bannatyne* observes, "Although a commission of bankrupt was ever so fairly obtained, yet, if it be produced here, and we are satisfied that the party is not domiciled in *England*, but in *Scotland*, I should hold, in that case, that we are not bound to give effect to the commission." And he had doubts whether they ought not to grant the sequestration. Lord *Craigie*, reserving himself as to the effect of the sequestration, said, "I have no idea that, *ipso jure*, an *English* commission destroys the operation of diligence in *Scotland*." Thus, it seems, that, even in *Scotland*, it depends on circumstances, whether a prior *English* commission shall prevent an attachment. Lord *Meadowbank* says, (*ib.* 481.) "It was formerly a principle, that a judicial transfer only operated *infra territorium*, and had no binding influence beyond it." He "thought it was a difficult thing to deviate so far from principle, as to transfer property in *Scotland*," without regard to the forms and rules of that country; but that he yielded to the consideration, "that it had been recognized as law, by judgments of the chancellor, for so long a period, that it might be considered as a principle of the law of nations." But when was the new rule recognized and established? And by whom? In *Selkirk v. Davies*, (2 *Dow's Rep.* 230—248.) Lord *Eldon* said, "he agreed with a distinguished writer (*Bell*) on the *Scotch* bankrupt law, that all the cases prior to that of *Strothers* exhibited a very distressing versatility of opinion; for he confessed he was unable

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to discover any principle common to them all." Why were the various opinions of the *Scotch* judges considered as distressing? They were contending for judicial independence; for old rules: so are the plaintiffs. The chancellor (4 *Johns. Ch. Rep.* 468—472.) cites Lord *Bacon* and *Huberus*. Lord *Bacon* qualifies his position by confining it to cases, *quæ nil ad jurisdictionem pertinent*; and here the only question is as to jurisdiction; whether it shall be exercised over this property by the courts of *Westminster Hall*, or of *New-York*. So *Huberus*, admitting that the foreign law, in itself, has no operation, *limits the comity to be exercised towards it, to cases in which it may be yielded, *sine suo suorumque præjudicio*." But is it no prejudice to our citizens, to send them three thousand miles from home, to obtain payment? to take from them the property to which they trusted, and transfer it to foreign creditors? Lord *Ellenborough* himself, in *Potter v. Brown*, (5 *East's Rep.* 124—131.) decides the question in favor of the attachment law of this state. He says, "We always import, together with their persons, the existing relations of foreigners, as between themselves, according to the laws of their respective countries; *except, indeed, when those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way; in which case, our own is entitled to a preference.*" In *Harrison v. Sterry*, (5 *Cranch's Rep.* 389—202.) the Supreme Court of the *United States* say, that, "as the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the *United States*, the remaining two thirds of the fund are liable to the attaching creditors, according to the legal preference obtained by their attachments." It is admitted, that the attachments, in that case, were prior to the issuing of the *English* commission of bankrupt; but whether the attachment is prior, or subsequent to the commission, can make no difference; and such was the opinion of the Supreme Court of *Pennsylvania*, who, in the case of *Milne v. Moreton*, (6 *Binney's Rep.* 353.) decided, after solemn argument, that the subsequent attachment, under the law of that state, overreached the prior *English* commission.

Next, let us look at the consequences of the doctrine contended for by the defendants. The whole nation, if we may judge by the decision of congress, are opposed to a bankrupt law of the *United States*; and must our citizens be made subject to foreign bankrupt laws? Are our courts to become ancillary to foreign courts, by giving effect to foreign laws of bankrupts? The several states, though they cannot pass *bankrupt* laws, may, by establishing this doctrine in their courts, set up as many bankrupt laws as there are countries with whom they trade. If the *English* commission is to operate as a statutory transfer, to what period, *short of that expressed in the statute, can it be limited? It must be interpreted according to the terms of the statute, and have relation back to the act of bankruptcy; and thus overhaul transfers, judgments, executions, and vacate payments, &c.

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2. The assignment by the bankrupt himself, in this case, being made, *eodem flatu, et eodem intuitu*, with the commissioners' assignment, is a part, merely, of the same assignment, making, together,

one conveyance, of which the assignment of the commissioners is the principal. It is a link in the chain of conveyance. It must, therefore, follow the fate of the statutory conveyance.

3. If the bankrupt's own assignment is not a part of the same conveyance, it is an act of bankruptcy, in itself, and void by the law of the country where it was made; or, in effect, a nullity, as the bankrupt had nothing to assign. (*Cullen's Bank. Law.* 50, 51, 52. 11 *Vesey*, 83.)

4. If the bankrupt's assignment stood alone, it would be fraudulent and void, as against the laws of this state. (*Jackson v. Jackson*, 1 *Johns. Rep.* 424. *Borden v. Fitch*, 15 *Johns. Rep.* 121. *Monk v. Abel*, 3 *Bos. and Pull.* 35.)

5. The assignment by the bankrupt himself, being a mere *voluntary* conveyance, is void by the statute of frauds. The term *voluntary* is used in contradistinction to an assignment for a valuable consideration. For it is so far from being voluntary, in any other sense, that, as was observed by *Law, arguendo*, in *Hunter v. Potts*, "it is by the *compulsory* force of the legislature." The argument that it is not held voluntary in *England*, but for a valuable consideration, that is, the discharge of the bankrupt, does not apply here; for the bankrupt's certificate does not discharge him from debts due here. (4 *Term Rep.* 193. 1 *Johns. Rep.* 112. 3 *Caines's Rep.* 154.) The words of our statute are very comprehensive. (1 *N. R. L.* 75. sess. 10. ch. 44.) It is, indeed, declaratory of the common law, by which such a conveyance would be a nullity, as against creditors. (*Cow.* 434. 3 *Co.* 82. *Jackson v. Myers*, 18 *Johns. Rep.* 427. *Sands v. Codwise*, 4 *Johns. Rep.* 598. *Anderson v. Roberts*, 18 *Johns. Rep.* 514. 2 *Johns. Ch. Rep.* 565. 14 *Johns. Rep.* 458.)

*6. The payment, by the defendants, of the debt due by the absent debtor, being made after notice of the attachment, was made in their own wrong. (1 *N. R. L.* 157. sess. 24. ch. 49. sec. 5. 23.) (a)

7. The placing in *London*, on the 21st of *May*, 1818, the debt due from the absent debtor, in the hands of *Baring, Brothers & Co.*, (some of the partners of which house were assignees under the *English* commission,) was, in law, a fraud on the vested rights of the *American* attaching creditor. (1 *N. R. L.* 159. sess. 24. ch. 49. s. 10. *Johnson v. Bloodgood*, 1 *Johns. Cases*, 51. *Wardell v. Eden*, 2 *Johns. Cases*, 121. *Tuttle v. Bebee*, 8 *Johns. Rep.* 152.)

8. The subsequent judgment of the Mayor's Court of *London* was, therefore, in law, fraudulent; and payment under it is no valid defence against the claims of the *American* attaching creditor, under the previous attachment sued out, and notified according to the law of this state. On laying the attachment in *London*, the garnishees ought to have given notice to the defendants; and for not doing so, a garnishee has been held liable to pay over to the defendant in the attachment, the amount he had before paid, under the judgment, obtained on an attachment to the attaching

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creditor. (*Fisher v. Lane*, 3 *Wils.* 297. S. C. 2 *Black. Rep.* 834. cited in 3 *East*, 372. *M' Daniel v. Hughes*, 3 *East*, 367.)

9. The agents, in *London*, of the defendants here, might have pleaded the attachment here in bar of the subsequent attachment in *London*; and, not having done so, the defendants are liable. (*Embree & Collins v. Hanna*, 5 *Johns. Rep.* 103. *Brook v. Smith*, 1 *Salk.* 280. *Privileges of London*, 254. 270. *Stevenson v. Pemberton*, 1 *Dallas's Rep.* 3. *Walker v. Gibbs*, 2 *Dallas's Rep.* 211. 1 *Salk.* 291. *Masters v. Lewis*, 1 *Lord Raym.* 567. *Lewis v. Walker*, 2 *T. Jones*, 222. *Blacquiére v. Hawkins*, *Doug.* 380. 1 *Comyn's Dig.* 582. *Ross v. Clark*, 1 *Dallas's Rep.* 354. *M'Combe v. Executors of Hudson*, 2 *Dallas's Rep.* 78.)

10. The defendants, by the custom of *London*, might, within twelve months, have filed bail, after the judgment against the garnishees, and pleaded the attachment here; and, having neglected to do so, the payment under that *judgment is voluntary, and no defence to the present action. (*M' Daniel v. Hughes*, 3 *East*, 375, 376. 380. *Privileges of London*, 237. 244. 251. *Dyer*, 196. b. *Lutw.* 991. 1 *Brownl.* 60. *Marriott v. Hampton*, 7 *Term Rep.* 269. *Loomis v. Parker*, 9 *Johns. Rep.* 244. *Blacquiére v. Hawkins*, *Doug.* 380.)

11. The commission against *Mullett* was sued out, and the assignment under it made, *flagrante bello*, between the *United States* and *Great Britain*; consequently, both the commission, and the proceedings under it, were null and void, as against *American* citizens. (*Griswold v. Waddington*, 16 *Johns. Rep.* 438. *Selkrig v. Davies*, 2 *Dow's P. C.* 230. 2 *Rose's B. C.* 201. *Wilkes v. Peterson*, 7 *Taunt.* 439.)

P. A. Jay, contra. 1. This cause has been already argued and decided in the Court of Chancery; (4 *Johns. Ch. Rep.* 460.) and it might be thought sufficient, perhaps, merely to refer to the very learned and able opinion delivered by his honor the chancellor, on dismissing the plaintiff's bill; but the elaborate argument which the court has just heard, renders it proper to examine the principal points and authorities which have been relied upon in support of the plaintiff's claim.

The attachment law of this state, under which the plaintiffs claim, gives no exclusive advantage to the attaching creditor. The attachment is for the equal benefit of *all* the creditors, wheresoever they may reside; for *English* as well as for *American* creditors. So, on the other hand, the assignment under the *English* bankrupt law, is for the equal benefit of *all* the creditors of the bankrupt, wheresoever they may reside; for *American* as well as *English* creditors. The *English* assignees of *Mullett*, the bankrupt, and the plaintiffs who have been appointed trustees, under the law of this state, of *Mullett*, as an absent debtor, are trustees for the very same individuals. The creditors of *M.* have already received from the defendants the full amount of the debt demanded in the present action; and the plaintiffs now ask this court to compel the defendants to pay the same debt, a second time, for the benefit of the same individuals. *Conscious of the injustice of their claim, the

plaintiffs' counsel have endeavored to excite national prejudices, and to cast an odium on the defendants, by representing them as wishing to subject the citizens of this state to the operation of *English* statutes. But, before this court, such an attempt must be in vain. We rest our defence solely on the law of this state. When the people framed the constitution under which this court is now sitting, they adopted the common law of *England*, then existing, as the law of this state, subject to such alterations and modifications as the legislature might afterwards make. The late convention, in remodelling that constitution, have again adopted the common law of *England*, as it existed here on the 19th of *April*, 1775, subject to the same legislative alteration. If there be any law obligatory on the court, it must be that which has been engrafted into the constitution of the state, and which owes its authority to the free choice of the people, expressed by them twice in the most solemn manner. Before our revolution, the *English* courts were the authoritative expounders of this law; and their decisions are still obligatory on the courts of this state; not because they are *English* decisions, but because the people of this state have so willed it. The decisions of *English* courts since the revolution, though not binding here, are, nevertheless, to be received as evidence of the law of that country, in like manner, as the opinions of eminent lawyers of any other country would be evidence of the law of such country. If these later decisions have been in perfect accordance with those pronounced anterior to the revolution; if they are all consistent with each other; if they are numerous; if they have been made by different courts, at different times, and in different parts of the *British* empire, and by lawyers of the greatest learning, talents and reputation, the presumption that a principle recognized in all of them, is a true and sound principle, is irresistible; and it is hardly to be supposed, that this court can be induced, by the arguments of the learned counsel on the other side, to overrule the concurring decisions of Lord *Hardwicke*, Lord *Camden*, Lord *Mansfield*, Lord *Thurlow*, Lord *Loughborough*, Lord *Kenyon*, and Lord *Eldon*, as *not warranted by the common law of *England*. We contend, that by that law, as it existed at the time of our revolution, and adopted here by our constitution, an assignment of personal property, made by the law of a foreign country, in which the owner is domiciled, will vest in the assignee a title to such property situated in this state. If this position be correct, the plaintiffs cannot recover. They claim no property, except that which belonged to *F. Mullett*, at the time the attachment issued, which was in *August*, 1816. But, if the right to the debt due from *Isaac Clason* to *M.* vested in his assignees, by the assignment made in *February*, 1815, it follows, that it did not belong to him in *August*, 1816. It is of no importance to determine, whether the assignees could sue for the debt in their own names, or whether they would be obliged, as in the case of *Bird and others v. Pierpont*, (1 *Johns. Rep.* 118.) to sue in the name of the bankrupt; for it is well settled, (*Jackson v. Walworth*, 1 *Johns. Cases*, 372.) that property held in trust by an absent debtor will not pass to the trustees for his creditors under our act.

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In the case of Captain *Wilson*, an *English* bankrupt, decided by Lord *Hardwicke*, in 1755, he held, that an attachment of a debt due to the bankrupt in *Scotland*, subsequently to the bankruptcy, was of no avail, the property being, by the assignment, vested in the assignees under the commission. This case is in point; and it is the stronger, because the Court of Sessions in *Scotland* concurred in opinion with the *English* Court of Chancery. The best account of this case is to be found in the opinion of Lord *Loughborough*, in *Sill v. Worswick*; (1 *H. Bl.* 691.) and from what he said, in *Foliot v. Ogden*, (1 *H. Bl.* 132.) the decree appears to have been affirmed in the House of Lords.

The case of *Solomons and others v. Ross* (1 *H. Bl.* 131.) was decided in 1764. A bill was filed by *Israel Solomons*, an attorney in fact of the curator of certain *Dutch* bankrupts, in their names, and his own, against the defendant, who had attached a debt due to the bankrupt in the Lord Mayor's Court of *London*, and, after judgment upon that attachment, had received the note of the debtor in payment. The money having been brought into court, it *was decreed, that it should be paid to the attorney of the curators.

In 1764, the case of *Neal and another, Assignees of Gratton, v. Cottingham and Houghton*, was decided in the Court of Chancery in *Ireland*. (1 *H. Bl.* 132.) The plaintiffs were assignees of a bankrupt, under an *English* commission. The defendants had attached and recovered in *Ireland* a debt due to the bankrupt. The court decreed, that the defendants should pay to the assignees the money thus recovered. The reporter adds, as this was the first cause of this kind ever decided in *Ireland*, the lord chancellor called in the assistance of several of the judges; and, after great consideration, with the approbation of the judges whom he consulted, pronounced a decree in favor of the plaintiffs.

In 1769, the case of *Jollett and Reitveld v. Deponthieu and Baril* (1 *H. Bl.* 132.) came before Lord *Camden*. The plaintiffs were curators of certain *Dutch* bankrupts. The defendant *Deponthieu* had attached moneys of the bankrupts, in the hands of the other defendant, *Baril*. The curators filed a bill, in their own names, to enjoin proceedings on the attachment, and to compel a payment of the money to themselves, which was decreed, and a perpetual injunction awarded.

In 1779, the case of *Le Chevalier v. Lynch* (1 *Doug.* 169.) came before the Court of K. B. The defendant owed money to a bankrupt, one of whose creditors had attached the debt, in the island of *St. Christopher's*. The plaintiff, as assignee of the bankrupt, brought the suit to recover the same debt. Lord *Mansfield* said, "If a bankrupt has money owing to him out of *England*, as in *St. Christopher's*, *Gibraltar*, &c., the assignment under the bankrupt laws so far vests the right to the money in the assignees, that the debtor shall not turn them round, by saying he is only accountable to the bankrupt. In *Scotland*, they permit assignees of a bankrupt in *England*, to sue for money owing to the bankrupt in *Scotland*; and it has been determined at the *Cockpit*, upon solemn consideration. that bills by *English* assignees may be maintained

in the plantations upon demands due to the bankrupt's estate." It does *not appear, from the report of this case in *Douglas*, whether the debtor had paid the money on the attachment; but this omission is supplied by *Law*, who cites this case, (4 T. R. 186.) where it is stated that the money had been paid.

In 1791, the case of *Sill v. Worswick* (1 H. Bl. 690.) was decided in the Court of C. P. It was an action by the plaintiff, as assignee of a bankrupt, against the defendant, who, after the assignment, had attached and recovered a debt due to the bankrupt, in the *West Indies*. Judgment was rendered for the money so recovered. And Lord *Loughborough* said, "It is a clear proposition, not only of the law of *England*, but of every country in the world, where law has the semblance of science, that personal property has no locality; but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession, or by the act of the party, it follows the law of the person."—"Personal property, then, being governed by the law which governs the person of the owner, the condition of a bankrupt, by the law of this country, is, that the law, upon the act of bankruptcy being committed, vests his property, upon a just consideration, not as a forfeiture, not on the supposition of a crime committed, not as a penalty, and takes the administration of it, by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of *England*; if the country in which it lies proceeds according to the principles of well-regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the courts of this country have been uniform to admit the title of foreign assignees." The whole of this opinion is important, and shows that Lord *Hardwicke* had held the same doctrine.

In 1791, the case of *Hunter v. Potts* (4 T. Rep. 182.) was decided by the K. B. The plaintiff, as assignee of a bankrupt, brought the action against the defendant, who had attached property of the bankrupt, in *Rhode Island*, and thus recovered a debt due to him from the bankrupt. Judgment was given for the plaintiff. Lord *Kenyon* said, *—"The only question here is, whether the property in *Rhode Island* passed by the assignment, in the same manner as if the owner (the bankrupt) had assigned it by his voluntary act; and that it does so pass, cannot be doubted, unless there were some positive law of that country to prevent it." This judgment was affirmed in the Exchequer Chamber, by the opinion of all the judges except Ch. Justice *Eyre*. (2 H. Bl. 402.)

In *Smith v. Buchanan*, (1 East, 11.) decided in 1800, Lord *Kenyon* says, "It is true, we so far give effect to foreign laws of bankruptcy, as that assignees of bankrupts, deriving title under foreign ordinances, are permitted to sue here for debts due to the bankrupt's estate; but that is because the right to personal property must be governed by the laws of that country where the owner is domiciled.

The case of the *Bank of Scotland v. Assignees of Scott, Smith,*

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Stein & Co. was decided in the Court of Sessions, in *Scotland*, in 1813. (1 *Rose's Bank. Cases*, 462.) The bankrupts carried on business at *London* and at *Edinburgh*. Three of the partners lived in *London*, and two at *Edinburgh*. A commission of bankrupt issued in *England*, and the bank prayed a *sequestration* in *Scotland*, which was denied, on the ground that all the estate of the bankrupts in *Scotland* was already vested in the assignees under the commission. Lord *Robertson* said, "This is certainly a case of great importance. But it appears to me that we have clear principles of international law to govern our decision: Principles which have been repeatedly recognized by the solemn judgments of this court, and to which I am of opinion that we ought now to adhere, unless we are to throw into confusion the whole system of our bankrupt law." After noticing some preliminary points, he proceeds—"It is a question of great importance, what is the effect in *Scotland* of an *English* commission of bankrupt. In my opinion, the effect to be given to it, in every country where the true principles of international law are understood, is, that it must carry the whole estate of the bankrupt. It is a principle which has been long established, that movables have no locality. They follow the person of the owner, and their condition is governed by the law of his domicil. *It may be said, that is a fiction, and it is so; but it is a fiction introduced upon the soundest principles of justice, and in practice has been attended with the most beneficial consequences. It has been confirmed by repeated decisions, which your lordships will not now shake. It follows, clearly, indeed, from attending to the case of transmission of movables *inter vivos*; and the doctrine is well laid down by Lord *Loughborough*, who states it, as an undeniable principle of international law, acknowledged wherever law is a science, that movables have no locality. As a voluntary conveyance of movables in *England* will carry those situate in other countries, so must a commission of bankrupt, issued in *England*, attach the whole effects, wherever situate."

Lord *Meadowbank* said, "Equiparating this case to the ordinary case of transference, by contract of marriage, where a lady of fortune, having a great deal of money in *Scotland*, or stock in banks or public companies there, marries in *London*, the whole property is, *ipso jure*, her husband's. It is assigned to him. The legal assignment of a marriage operates, without regard to territory, all the world over."

Lord *Bannatyne* observed, "It is a maxim of universal law, that movables follow the person; and, therefore, it is clear, that these must be carried, either by the sequestration or by the commission, according as the one or the other is first issued."

Lord Justice *Clerk* said, "We are now to decide the great question, whether a commission of bankrupt, issued with all due form and solemnities in *England*, ought or ought not to carry the estates of parties who have been rendered bankrupt in *England*, but who have effects in *Scotland*. I agree with all the opinions given by your lordships upon this general point, because I conceive that such opinions are only giving effect to previous solemn judgments."

Again in *Selkraig v. Davies*, which came to the House of Lords, 176

on an appeal from the Court of Sessions of *Scotland*, n 1814, (2 *Rose's Bank. Cases*, 99. 313.) Lord *Eldon* said, "But, notwithstanding that, one thing is quite clear, there is not in any book, any *dictum*, or authority, that would authorize *me to deny, (at least in this place,) that an *English* commission passes (as with respect to a bankrupt and his creditors in *England*) the personal estate he has in *Scotland*, or in any foreign country." And the judgment of the Court of Sessions, which was to the same effect, was affirmed. In 1815, was decided the case, *Ex parte Cockayne and others, in the Matter of Cliff*, (2 *Rose's Bank. Cases*, 234.) Certain *Scotch* creditors opposed the granting the bankrupt certificate, on the ground that the question of sequestration was pending in *Scotland*. The lord chancellor directed the certificate to be allowed, observing, "That the law was now too well settled, between a sequestration, and a commission, to authorize the staying of a certificate upon the ground of a subsequent sequestration."

Thus, there appears to be an uninterrupted series of decisions, for nearly seventy years, all of them adopting the principle for which we contend, and applying it to cases like the present. The *English judges*, even before our revolution, gave effect to foreign assignments in bankruptcy, in preference to subsequent judgments, obtained in their own courts, by their own subjects. The *Irish judges* did the same; and the Supreme Court of *Scotland* has since done the same. All these courts assert, that their decisions are not only conformable to the common law of *England*, but to the law of nations. This court, as far as it has gone, has proceeded upon the same principle. In *Bird, Savage and Bird v. Pierpont* (1 *Johns. Rep.* 118.) the court took notice of the rights of foreign assignees, and allowed them to maintain an action in the name of the bankrupt. In the case of *Bird v. Caritat*, (2 *Johns. Rep.* 344.) Ch. Justice *Kent* said, "There can be no doubt of the right of the assignees to collect the debts due to the bankrupt, either by a suit in their own names, or as trustees suing in the name of the bankrupt. It is a principle of general practice among nations to admit and give effect to the title of foreign assignees. This is done on the ground, that the conveyance, under the bankrupt laws of the country where the owner is domiciled, is equivalent to a voluntary conveyance by the bankrupt, and that the general disposition of personal property by the owner, in one country, will affect it every *where, because, in respect of the owner's control over it, personal property has no locality."

It has been said, that, by the *English* law, *choses in action* have locality, because they may be *bona notabilia*. But though the ecclesiastical courts of that country take notice, in some instances, of the residence of a debtor, for the purpose of ascertaining the proper jurisdiction by which administration is to be granted of the estate of the creditor; yet, even in the interpretation of wills, *choses in action* are not allowed locality. In *Moore v. Moore*, (1 *Bro. Ch. Ca.* 127.) a bequest had been made by the testator of all his goods and chattels in *Suffolk*. The plaintiff claimed a bond under this bequest. Lord Chancellor *Thurlow* held, 1. That the words "goods and chattels" included *choses in action*; but, 2. That the

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bond did not pass under the bequest. "*Choses in action*," said he, "have no locality; bonds have no more locality than other *choses in action*, otherwise than by drawing the jurisdiction of the ecclesiastical court."

In opposition to this doctrine, there is to be found the case of *Taylor v. Gear and others*, in the Superior Court of *Connecticut*, (*Kirby's Rep.* 311.) In that case, after a verdict for the plaintiff, for a book debt, the defendants moved in arrest of judgment, because they were uncertificated *English* bankrupts. This extraordinary motion was overruled by the court, who made the obvious remark, that this fact would constitute no defence even in *England*; and that, supposing it to be a good defence, it ought to have been pleaded. But the court also said, what the case did not require, that a commission of bankruptcy against the defendant in *England* did not secure their effects in *Connecticut*; but that they remained, as before, transferable by them, and open to the attachment of their creditors, as well *British* as *American*. This singular *dictum* is more than countervailed by the opinion of Chief Justice *Parsons*, in *Goodwin v. Jones*, (3 *Mass. Rep.* 517.) "It is admitted," he said, "that the assignee of a bankrupt, duly appointed pursuant to the laws of the state where the bankrupt dwells, may maintain an action, in that character, in any other state, the laws of which are not repugnant to his recovery." And again: "The assignment *of a bankrupt's effects may be considered as his own act, as it is in the execution of laws by which he is bound, he himself being competent to make such assignment, and voluntarily committing the act which authorized the making of it."

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In *Harrison v. Sterry and others*, (5 *Cranch*, 289.) certain debts, due to *Bird, Savage & Bird*, had been attached under a law of *South Carolina*, in *April*, 1803. A commission of bankruptcy issued against the firm in *England*, in *June*, 1803. The assignees under the *English* commission claimed the debts so attached, and the Supreme Court of the *United States* disallowed their claim. Nothing can be more clear, than that the subsequent assignment in *England* could not divest the rights previously acquired by the attaching creditors. And Chief Justice *Marshall* disposes of this claim by a bare remark, that the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the *United States*. As far as related to the case before him, the observation was undoubtedly just. But, it is not to be presumed, that this eminent judge meant to overrule all the authorities which have been cited, without giving a single reason for doing so, or that he intended to decide the general question as to the operation of foreign bankrupt assignments, which had not been argued, and which could not arise in that cause.

In the case of *Burk and others v. M'Lain*, (1 *Harris and M'Henry's Rep.* 236.) decided in the Provincial Court of *Maryland*, in 1766, a *British* creditor attached the effects of a *British* bankrupt, in *Maryland*, and the court set aside the attachment. This is all we know of the decision from the report of the case; and it is in our favor. There is, however, added to the report, the opinion of *D. Dulaney, Esq.*, who seems to think, that an attachment

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by a *Maryland* creditor would have been good. But to this opinion may be opposed that of Lord *Talbot*, given in 1723, and published in *Beawes's Lex Mercatoria*, page 499, that the right to the effects of an *English* bankrupt in the plantations vested in his assignees, although the bankrupt laws did not extend to the plantations, and though his certificate would be no discharge to him there.

*The case of *Wallace and others v. Patterson and others* (2 *Harris and M'Henry*, 463.) also arose in a court in *Maryland*. The only point argued and decided was, that a separate creditor of one of the partners in a firm might attach his share of a debt due to the firm. The effect of an assignment under a commission of bankruptcy was not discussed. In the case of *Milne v. Moreton*, (6 *Binney*, 353.) decided in the Supreme Court of *Pennsylvania*, in 1814, there was no assignment executed by the bankrupt, and it was decided by a majority of the court, that the attachment, under the law of *Pennsylvania*, which does not resemble our law, should prevail. But to this decision, and to all the *dicta* which may be produced against the defendants, we might fairly oppose the judgment of the Court of Chancery of this state, between the parties now before the court.

Such are the authorities upon this point, and we trust that we have shown, that by the law of *England*, as adopted by the people of this state, an assignment under a foreign commission of bankruptcy, vests in the assignees a right to the bankrupt's personal effects every where. If such be the law, it is in vain to inquire whether it is politic or expedient. Such questions belong to the legislature. The duty of courts is to declare the law, not to make it. It has been said, that the *English* bankrupt acts are penal; and that we ought not to execute the penal laws of another country. This is an error. Those laws do, indeed, impose penalties which are not to be inflicted here; but they are also remedial; and the vesting the estate in trustees for the mutual benefit of the bankrupt and his creditors, is not a penalty imposed, but a remedy provided by those laws. Lord *Loughborough*, in his opinion, already cited, says, that the property is vested in the assignees, upon a just consideration, *not as a forfeiture, not on the supposition of a crime committed, not as a penalty*. And this is undoubtedly true. Before dismissing this point, we must call the attention of the court once more to the nature of our *absent debtor act*. The opinion of the court of *Pennsylvania* turned partly on the fact, that the attaching creditor was an *American* citizen; and the hardship of depriving an *American* citizen of his remedy, *is an argument which has been much dwelt on, by the counsel for the plaintiffs. But the creditors, for whose benefit an attachment has been issued, and for whom the plaintiffs are trustees, are not *American* citizens. It is for the equal benefit of *all* the creditors of *F. Mullett*, where-soever they reside; for those who reside in *London*, and have proved their debts, and received dividends under the commission there, no less than for those few who reside here. Neither can it be said, with propriety, that, under our act, a *lien* is obtained upon any particular debt. The act differs wholly from any law concern-

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ing attachments, with which we are acquainted. It vests in trustees, *all* the property of the absent debtor, for the benefit of *all* his creditors. It is, in effect, a bankrupt act in every thing but in providing for the debtor's discharge. This view of our act presents, if we are not mistaken, a material difference between the state of facts in this cause, and that in *Milne v. Moreton*.

2. But if a right to the debt in question did not pass by the assignment under the commission, it passed by the voluntary assignment of *F. Mullett*, made long previous to the proceedings under our act relative to absent debtors.

In *Milne v. Moreton*, Ch. Justice *Tilghman* says, "We have no laws prohibiting foreigners from the free disposal of their personal property situated here. Therefore, if *Topham* (the bankrupt) had made an assignment of his property in the hands of his garnishee, the case would not have admitted of a moment's speculation. For though, in strict law, a *chose in action* is not assignable, yet it is in equity; and an equitable assignment made *bona fide*, and for a valuable consideration, will be protected against attachment." So that, if that case be against us on one point, it is directly in our favor upon another.

It is, however, objected to this voluntary assignment, that it was made *eodem flatu*, with the assignment of the commissioners. What then? Supposing the latter to be inoperative here, there is nothing in it so odious and abhorrent to our laws as to poison and contaminate every act done at the same time. If one part of the same instrument may be valid and another invalid, which is often the case, surely, a good instrument cannot be vitiated, because executed contemporaneously with another, which has only a local operation.

It is, also, urged, that this assignment is void, as being made in *fraudem legis* of the state of *New-York*, because intended to protect the debts assigned from being attached under our law. No such intent can be presumed from the facts in the cause. Nor did any attachment issue until *eighteen* months after the assignment. If this objection be a good one, then every assignment by a foreigner, of a debt due from a resident here, will be void; which will certainly not be contended.

It is further alleged, that this assignment is void under the act for the prevention of frauds. But it has been so often decided that a conveyance in trust for creditors is not avoided by that statute, that it is unnecessary to argue that point.

The only objection to this assignment, which can have any weight, is, that it is void by the bankrupt laws of *England*. But this cannot be urged by the plaintiffs, without giving up their objection to the commissioners' assignment. If the law of *England* is to be noticed for the purpose of annulling one assignment, must it not, also, be recognized to uphold the other? Are we to give effect to foreign bankrupt laws, so far as they disable debtors from transferring property, and yet refuse to allow them to operate, in validating a transfer? But how is this transfer invalid by the *English* law? Merely because there is no subject upon which it can operate. That law considers the whole property of the bank-

rupt as already transferred by the commissioners' assignment; and, therefore, they consider his subsequent assignment as ineffectual; but it is not *prohibited*; nor could an act, done with the express intent of giving effect to the bankrupt law, be considered, by the courts of that country, as done in fraud of them. After the first assignment, the right to the debt now demanded was in some person. If it was not in the assignees, it must have remained in the bankrupt. If it was in him, we have no law which forbade him to assign it for the benefit of all his creditors. And he has done so.

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*3. But, whatever may be the opinion of the court upon the other points, we insist, with entire confidence, on the third point which we have made: namely, that the defendants, having been once compelled to pay this debt, by the judgment of a court of competent jurisdiction, cannot, and ought not, to be compelled to pay it over again. (*Chevalier v. Lynch*, Doug. 170. *Allen v. Dundas*, 3 Term Rep. 129. *Embree v. Collins and Hanna*, 5 Johns. Rep. 101.) The plaintiffs' counsel, to elude the force of this defence, boldly avers, that the judgment rendered in *London* was fraudulent and collusive. Fraud is odious, and not to be presumed: it must be proved. But the case contains no circumstance which affords ground even for suspicion. There is no apparent motive why the executors of Mr. *Clason* should desire to pay the *English* assignees rather than the plaintiffs. They could make no defence in an *English* court; but they did no act which facilitated a recovery. Their conduct, in continuing one of the first commercial houses in *Europe* in the agency to which they had been appointed by the testator, was innocent and proper. Nor could their doing so have any effect upon the proceedings under the attachment. Their moneys would have been equally liable to be attached in the hands of any other agent.

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Again: It has been said, that the assignment in *England* was made *flagrante bello*; but, if that were the fact, is not an assignment or transfer of personal property here, by a person in *England*, during war, valid?

Caines, in reply, said, that it was not true that the plaintiffs were trustees for all the creditors of *Mullett*; they were so only for such as came in under the attachment. Those creditors who had come in under the *English* commission, could not come in under the attachment here, without bringing in the dividends received under the commission, and renouncing them. Our citizens insist on a preference, in virtue of the attachment law, over the other creditors not coming in under it, but claiming out of another fund. The *American* creditors look to the *American* fund; the *English* creditors to the *English* fund. When the *American* creditors are satisfied, the *surplus* will go to the assignees of the bankrupt, as it would to the bankrupt himself, if there had been no commission issued. In this mode, every comity is rendered to the laws of other countries, which the independence of our own laws and judiciary, and the rights of our citizens, will warrant.

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We admit that the bankrupt assignment passes all the property

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of the bankrupt here, and every where; *provided*, always, that there are no creditors here having claims on that property. We admit the right of the assignees of the bankrupt to collect his property here, and take it to *England*, if there are no creditors of the bankrupt here; but not otherwise. If there are creditors attaching here, there is a *conflictus legum*, and the foreign law must yield.

• PLATT, J. Three points are presented in this case:

1st. Whether the assignment by the commissioners of bankrupt in *England*, (being prior in date,) transferred this *chose in action* to the assignees of the bankrupt, in opposition to the claim of the trustees under the attachment *here*.

2d. Whether (if that statutory assignment was inoperative) the assignment made personally by *Mullett* to the same assignees, was effectual, in regard to the debt due from *Clason*.

3d. Whether the payment to the assignees of the bankrupt in *England*, under the circumstances of the case, is a good defence to this action.

I have read, and studied, with respectful attention, the opinion of his honor *the chancellor*, in a case between the same parties, and involving the same questions; (4 *Johns. Ch. Rep.* 460.) and it presents a new occasion to admire the extent and accuracy of his researches, and the liberal principles of public policy which characterize his decisions. After a luminous review of the cases, authorities, and learned *dicta* on this head, the chancellor decreed in favor of the defendants, on all the points here stated.

I fully concur with him in opinion, that in respect to the owner's control over it, (during peace,) personal property ought to have no *locality*: and my mind would most willingly *be led to the conclusion, that it would be a just and wise rule of international law, that the sequestration of personal property for the benefit of creditors, which is *prior* in point of time, should attach to itself the distribution of the whole funds, wherever situated. But however fit and convenient such a rule might be for the general interest and security of commerce, yet, so long as the evil passions and infirmities of our nature remain, I fear it is rather to be desired than expected. To be practicable and just, the rule must not only be reciprocal and universal, but it must be administered every where, with a liberal equity and an enlightened impartiality, that would inspire universal confidence; and which, I fear, cannot reasonably be expected, from the variously modified organs of judicial power in different countries.

It is admitted, "that every country may, by positive law, regulate, as it pleases, the disposition of personal property found within it; and may prefer its own attaching creditor to any foreign assignee; and no other authority has a right to question the determination." (4 *Johns. Ch. Rep.* 471.) This shows, that the liberal rule so ably contended for by our learned chancellor, and by Lord *Hardwicke*, Justice *Bathurst*, Lord *Camden*, Lord *Thurlow*, Lord *Loughborough*, Lord *Kenyon* and Lord *Eldon*, has not yet ripened into a law, obligatory on the community of nations.

(*Sill v. Worswick*, 1 H. Bl. 691. *Solomons v. Ross*, 1 H. Bl. 131. note. *Jollett v. Deponthieu, &c.* 1 H. Bl. 132. note. *Hunter v. Potts*, 4 Durn. and East, 182. *Case ex parte Blakes*, 1 Cox, 398. *Philips v. Hunter*, 2 H. Bl. 402. *Stein's case*, 1 *Rose's Cases in Bankruptcy*, App. p. 462. *Selkrig v. Davies*, 2 Dow, 230. 2 *Rose*, 291. *Smith v. Buchanan*, 1 East, 6. *Neale v. Cottingham*, 1 H. Bl. 132. note.) In this long list of cases, the *English* judges have generally advanced gratuitous dicta, far beyond what was required to decide the cases before them: and I, therefore, feel a strong impression, that his honor the chancellor has allowed to some of them more weight of authority than they merit.

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In the case of *Cleve v. Mills*, (1 *Cook. B. Laws*, 308. 4 edit.) Lord Mansfield held, "that the statutes of bankrupts *do not extend to the colonies; but the assignments under such commissions are considered as voluntary; and, as such, take place between the assignees and the bankrupt, but do not affect the rights of any other creditors."

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In the case of *Solomons v. Ross*, (1 H. Bl. 131. note.) which came before Mr. Justice Bathurst, sitting for Lord Northington, in 1764, "Messrs. *Deneufvilles*, merchants, at *Amsterdam*, corresponded with *Michael Solomons* and *Hugh Ross*, merchants, of *London*. On the 18th of *December*, 1759, the *Deneufvilles* stopped payment; on the 1st of *January*, 1760, the Chamber of Desolate Estates, in *Amsterdam*, took cognizance thereof, and, on the next day, they were declared bankrupts, and curators or assignees appointed of their estates and effects. On the 20th of *December*, 1759, *Ross*, who was a creditor of the bankrupts, to the amount of near £3000, made an affidavit of his debt in the Mayor's Court of *London*, and attached their moneys in the hands of *Michael Solomons*, who was their debtor to the amount of £1200. On the 8th of *March*, 1760, *Ross* obtained judgment, by default, on the attachment, and, thereupon, a writ of execution issued against *Michael Solomons*, who was taken in execution, but being unable to pay the £1200, gave *Ross* his note, payable in a month; on which *Ross* caused satisfaction to be entered on the record of the judgment.

"A few days after, one *Israel Solomons*, who had a power of attorney from the curators to act for them in *England*, filed a bill, making himself and the curators plaintiffs, praying that the defendant, *Michael Solomons*, might account with them for the effects of the bankrupts, which were in his hands, might pay and deliver the same over to *Israel Solomons*, for the use of the curators, and be restrained from paying or delivering them over to *Ross*.

"*Michael Solomons* then filed a bill, by way of interpleader, praying an injunction, and that he might be at liberty to bring the £1200 into court. This money was accordingly paid into the bank, in the name of the accountant-general, pursuant to an order of the court.

"The decree directed, *inter alia*, that the stock purchased with the money paid into the bank should be transferred *to *Israel Solomons*, for the benefit of the creditors of the bankrupts, and that *Ross* should deliver up the note given by *Michael Solomons*, for £1200, to be cancelled."

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In *Jollett, &c. v. Deponthieu and Baril*, before Lord Camden, in 1769, (1 H. Bl. 132. note.) *Deneufvilles*, merchants, at *Amsterdam*, stopped payment on the 30th of *July*, 1763. On the 8th of *October* following, the plaintiffs were appointed curators of their effects; and the bankrupts owed the defendant, *Deponthieu*, of *London*. On the 5th of *January*, 1764, the defendant, *Deponthieu*, attached the money of the bankrupts in the hands of *Baril*, a debtor of the bankrupts. Pending the attachment, the curators filed their bill for an account between the bankrupts and *Baril*; and that the balance might be paid to them, and the defendant, *Deponthieu*, be restrained from proceeding on the attachment. The decree was, "that the plaintiffs recover the balance due; and that a perpetual injunction issue against proceeding on the attachment."

In the case of *Mawdesley v. Parke and Beckwith*, (*Lincoln's Inn Hall*, 1779, before lords commissioners *Smythe* and *Bathurst*, 1 H. Bl. 680, as stated by Serjeant *Hill*, without contradiction, in *Sill v. Worswick*,) "the defendants were assignees under a commission of bankrupt against *Campbell and Hayes*; and, after the assignment to them from the commissioners, several of the bankrupt's creditors, in *Rhode Island*, attached a debt due from the plaintiff to the bankrupt, in pursuance of an act of assembly there, authorizing such process. The plaintiff coming to *England*, the assignees brought an action at law against him, and the bill was filed for an injunction, the plaintiff offering to pay what (if any thing) should appear to be due to the assignees, after deducting what should be recovered against him by the plaintiffs in the foreign attachment. The assignees, by their answer, insisted, that the property of the bankrupts was vested in them before the writs were served on the plaintiff, and, therefore, that he had no money or effects belonging to the bankrupts in his hands, and, consequently, that the plaintiffs in those writs were not entitled to recover any thing. An injunction had been granted, and, on showing cause why it should not be dissolved, the lords commissioners, **Smythe* and *Bathurst*, continued the injunction to the hearing, and refused to order the plaintiff to bring the money into court, but directed that he should give security, to be approved of by the master, to pay the defendants what (if any thing) should be decreed to be due; and they were of opinion, that the assignment *did not direct the property out of the bankrupts*, as the debt was due in the plantations, but only gave the assignees a right to sue for it; that the creditors *there* had also a right to sue for it, who, having commenced a suit first, and recovered judgment there, *had gained a priority* over the defendants; though it was admitted, that there had been two cases, one determined by Mr. Justice *Bathurst*, sitting for Lord *Northington*, the other by Lord *Camden*, where commissions of bankrupts were issued in *Holland*, and some of the bankrupt's effects attached in *London*, and the attachments were ordered to be discharged, and the money or effects paid to the assignees; and though it was argued by the counsel for the defendants, that the rule in that respect ought to be reciprocal, yet, it was answered, that the *bankrupt laws were not received in the*

Antations, and, therefore, this case was not like those two which were mentioned, there being bankrupt laws in *Holland*."

It is important to remark here, that as Mr. Justice *Bathurst* decided the case of *Solomons v. Ross*, in 1764, he must have considered it inapplicable to the case of *Mawdesley v. Parke, &c.*, which was also decided by him, in 1779. Perhaps, he may have been influenced by the consideration, that between *Holland* and *England* there was a near vicinity; and, what is of more importance, that a complete reciprocity existed as to the remedy; because a bankrupt law existed in both countries.

Solomons v. Ross, and *Jollett v. Deponthieu*, are the only cases in which the *English* courts have awarded the benefit of this rule to any other than *British* subjects; and it is to be lamented, that the meagre reports of those cases contain "merely dry decisions, unaccompanied with argument or illustration."

Lord *Kames*, in his "*Principles of Equity*," written in 1766, (b. 3. c. 8. s. 6. p. 573. 4th edit.) discussing the very question, as to the extent and effect of the *English* bankrupt laws, says, "Law cannot force the will, nor compel any man to make a conveyance. In place of a voluntary conveyance, when justice requires it to be granted, all that the legislature can do, is to be themselves the disponents; and it is evident, that their deed of conveyance cannot reach any subject, real or personal, but what is within their territory. This makes a solid difference between a *voluntary* and a *legal* conveyance. The former has no relation to place; the latter, on the contrary, has the strictest relation to place, and reaches not lands nor movables *extra territorium*. We may, then, with certainty, conclude, that the statutory transference of property from the bankrupt to the commissioners, cannot carry any effects in *Scotland*; these are subjected to our own laws, and our own judges; and cannot be conveyed from one person to another, by the authority of any foreign statute. The *English* bankrupt statutes, however, are not disregarded by us."

It seems to me, that the true principle is, that the assignees of a bankrupt are in the same, and no better situation, than the bankrupt himself, in regard to foreign debts. They take, subject to every equity, and subject to the remedies provided by the laws of the foreign country where the debt is due; and when permitted to sue in a foreign country, it is not as assignees having an interest, but as *representatives* of the bankrupt. The law of the domicil having sequestered the bankrupt's estate, so as to divest him of the control over it, and appointed them to administer it, they stand here on the footing of administrators merely, with a right of suing, in common with other creditors; but our law will not regard the *choses in action* as exclusively appropriated to their use, and the preference can only be gained by pursuing the remedies which our laws afford. This rule was exemplified in the case of *Mawdesley v. Parke and Beckwith*, before cited. The assignees of the *English* bankrupt are to be regarded as standing in the shoes of the bankrupt: and if *Mullett* had himself brought this suit, the attachment would certainly be a bar to his claim.

In the case of *Bird, &c. v. Caritat*, (2 *Johns Rep.* 342.) it was

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decided, that the assignees of an *English* bankrupt *could maintain a suit here, in the name of the bankrupt; and that case did not require a decision on the point now before us.

It is a principle universally acknowledged, that a *discharge* of a bankrupt, or insolvent debtor, affords no relief from his foreign debts. It has no effect beyond the jurisdiction where it is granted. (*Quin v. O'Keeff*, 2 H. Bl. 553. *Pedder v. M'Master*, 8 Term Rep. 609. *Smith v. Buchanan*, 1 East's Rep. 6. *Proctor v. Moor*, 1 Mass. Rep. 198. *Van Raugh v. Van Arsdaln*, 3 Caines's Rep. 154. *Smith v. Smith*, 2 Johns. Rep. 235.) It seems, therefore, unequal and inconsistent, to give such effect to the bankrupt system of any country, as to strip the bankrupt of all his personal property and *choses in action*, in a foreign country, and yet leave him bound for all that he owes abroad.

The *English* bankrupt law is, in its nature and origin, *penal*: against every person who commits an act of bankruptcy, it denounces that he shall, *ipso facto*, be divested of all his estate; and, according to the genius of the system, and the practice under it, the proceedings are strictly *in invitum*. Our "act for giving relief in cases of insolvency" is entirely different in its character. In theory and practice, it is a remedy voluntarily resorted to by the *debtor*, to obtain a discharge, upon a *cessio bonorum*. His honor the chancellor says, (*Holmes v. Remsen*,) "We are bound to give effect to the assignment, because it is equivalent to a voluntary act of the party over his own property," &c. "Every man's assent is to be presumed to a statute:" and he adopts the language of Chief Justice *Parsons*, (*Goodwin v. Jones*, 3 Mass. Rep. 517.) that "he considered the assignment under the bankrupt laws as the party's own act, since it was in execution of laws by which he was bound, and since he voluntarily committed the act which authorized the making of it." But, with great respect, it appears to me, that it would be unwise and unsafe to extend this doctrine so far. May it not, with equal justice, be said, that, if an *Englishman* commits an act of treason, the consequent forfeiture of his estate shall be deemed equivalent, *here*, to his own voluntary transfer; because he spontaneously did *the act, which, according to the laws of his country, worked the forfeiture?

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As to the acts of governments, generally, throughout the world, such reasoning should be sparingly indulged. It may easily be pushed to an extreme that would be cruel and absurd.

The maxim that "every man is presumed to be assenting, and a party to, the laws of his own country," may be *just* or *unjust*, according to its application. When applied to *Mullett*, the *English* bankrupt, and to his *English* creditors, it is just and proper; but in my judgment, it is not applicable to creditors who owe no allegiance to *Great Britain*; who have not, in any sense, actually or virtually assented to her laws; and who ask nothing of her tribunals. National comity requires no more, than that we should lend our aid in giving effect to such assignments, so far as may be done without impairing the remedies, or lessening the securities, which our laws have provided for our own citizens. "*Apices juris non sunt jura*"

The point decided in the case of *Sill v. Worswick*, (1 H. Bl. 665.) extended no further than what I here concede; namely: that an English creditor, after an act of bankruptcy, cannot attach, in a foreign country, money due to the bankrupt, without being liable to refund it to the assignees. It was a question between British subjects all round: and a British court treated them as parties, who had virtually assented to, and were bound by the act of their own government. I admit, however, that the reasoning of Lord Loughborough in support of that decision, embraced a wider scope. Lord Loughborough, in that case, (page 693.) says, "The court of St. Christopher's ought, unquestionably, to have preferred the title of the assignees, to the title of the creditor using the process of attachment, because the law of the country, to which the creditor making the demand was subject, had vested that property in the plaintiffs."

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The case of *Philips v. Hunter*, (2 H. Bl. 402.) before all the judges in the Exchequer Chamber, was also a question as to the effect of the English bankrupt law between British subjects. The case of *Hunter v. Potts* (4 T. R. *182.) is of the same character; the parties being all British subjects. I admit, without doubt or scruple, that these cases were all rightly decided: but so far as the reasoning and illustrations of those learned judges transcended the cases before them, with a view to establish a favorite theory, I enter my humble dissent.

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As was well observed by Mr. Justice Yeates, in *Milne v. Moreton*, (6 Bin. 369.) "It is one thing to assert, that assignees of bankrupts under foreign institutions should be allowed, by the courtesy of nations, to support suits, as representatives of such bankrupts, for debts due to them; and it is another thing to give efficacy to those institutions, to cut out attaching creditors, although posterior in point of time, who have commenced their proceedings under the known laws of the government to which they owed allegiance, and from which they were entitled to protection."

It is important to bear in mind, that the rule contended for by the courts in England and Ireland is, that under a commission of bankrupt, the property passes by relation to the act of bankruptcy. In that respect, Chancellor Kent admits, that in *Solomons v. Ross*, "the application of the rule was pushed too far." And he also protests against the same extension of the rule in *Neal v. Cottingham*; for it gave effect (he says) to the title of the assignees by relation back, beyond the time of their appointment, to the time of the act of bankruptcy committed; and so overreached the time of the attachment." And he says, "This doctrine of relation is a positive rule of mere municipal policy, which no other country is bound to adopt; as it would lead to great inconvenience," &c. I confess, I do not see on what principle we can adopt or reject the rule, by halves. It is a wise and essential provision of the bankrupt law, that it shall operate by relation to the act of bankruptcy; without which, the benefits of that law could not be secured; and every other part of the system, to my apprehension, is equally "of mere municipal policy." If we acknowledge it as a binding rule in any respect, I prefer to adopt it in all its parts; because I think it more just and equal with that feature, than without it. If for-

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tribunals, that the Supreme Court of *Pennsylvania*, the Superior Court of *Connecticut*, the General Court and Court of Appeals of *Maryland*, and the Supreme Court of the *United States*, have decided against the rule of comity *claimed by the *English* courts. (*Milne v. Moreton*, 6 *Bin. Rep.* 353. *Taylor v. Gear*, 1 *Kirb. Rep.* 313. *Wallis, &c. v. Patterson, &c.* 2 *Harris and M Henry*, 463. See, also, *Bush v. M Luin*, 1 *Harris and M Henry*, 236. Opinion of Mr. *Dulany*, in 1766. *Harrison v. Sterry*, 5 *Cranch*, 289.) Chief Justice *Marshall*, on this point, merely says, "The bankrupt law of a foreign country is incapable of operating a legal transfer of property in the *United States*." The subject was worthy of the powerful mind of that venerable and enlightened jurist; and, with the *chancellor*, I regret, "that a litigated point of law, of great importance," should have been settled "by a dry decision, unaccompanied with argument or illustration." It was, however, a point necessary to the decision of the case; and we are not at liberty to regard the opinion as *obiter dictum*. I am not aware of a contrary decision in any of our sister states; and, so long as our supreme national tribunal (to which all aliens, and all citizens of other states in the union, may compel a resort) denies to *Great Britain* the comity which she has tendered to us, it can hardly be expected, that a discrimination will hereafter be made by the *English* courts, in favor of the state of *New-York*, even if the supreme judicial tribunal of this state should accede to the rule of *Westminster Hall*.

Upon the whole, I am of opinion, that although such a rule of comity between *England*, *Scotland* and *Ireland*, and also between the states of our confederacy, may be convenient, and of easy application; yet, as between independent nations, it is so unstable and precarious, and subject to so many qualifications, and liable to so frequent interruptions, and necessarily involves a discretion so large, and so delicate, as to forbid a reasonable hope, that it can ever form a solid basis for private rights. Besides, the expense and delay of going abroad to prove debts, and to claim dividends, may be extremely inconvenient; and, during wars and embargoes, (so frequent in many countries,) such intercourse would be unlawful. If it be an advantageous rule, let it be the subject of treaty; and then our rights will not depend on the undefinable and capricious theory of *judicial comity*, but on the force of positive obligation. I do not mean, however, to suggest a doubt, but *that, independent of the statutory transfer, a *bona fide* assignment, for valuable consideration, or for payment of debts, freely made by such foreign creditor himself, would be valid against a subsequent attachment here; nor do I mean to question the settled principle of national jurisprudence, by which the succession to, and disposition of personal property, is regulated by the law of the owner's *domicil*, in regard to testamentary bequests, and the succession to the *personal* estates of intestates; and I admit, that the same general law governs the rights of the marriage contract. In the impressive language of Lord *Ellenborough*, (5 *East's Rep.* 131.) let it be reëchoed across the *Atlantic*, that these rights have *here* "been long settled in principle, and laid up amongst our acknowledged

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rules of jurisprudence." But these rights depend on a principle of public policy, which does not apply to, and which can never come in conflict with *creditors*, against whom, the claimants last referred to, have no rights, at home or abroad.

2. The next question is, whether the assignment made personally, by *Mullett*, after the commission of bankruptcy, was effectual to transfer this *chose in action* to the assignees. In the first place, I doubt its validity, because it was merely collateral to the proceedings under the commission, and was, in some degree, compulsory. But there is a stronger ground of objection. I admit that, as between the bankrupt and his assignees, and *English* creditors, they are all bound by the law of their own country; and, although I deny the effect of the statutory assignment, to create a *lien* here, so as to deprive *American* creditors of their remedy, by attachment under our laws; yet, it seems to me, that the bankrupt, *M.*, by the law of his *domicil*, was incapacitated to make any assignment, after the act of bankruptcy for which the commission issued; as to him, all his personal property and *choses in action*, throughout the world, and his power over it, were taken away; and the assignees under the commission were substituted in his stead. It was in the nature of administration granted on the estate of a man who, in regard to his property, was *civilly dead*. I deny the *lien* or *preference* here, by virtue of that statutory assignment; but freely admit the right of those assignees to *sue here, by virtue of the commission, or *authorization* in *England*; (requiring them, perhaps, to use the name of the bankrupt;) and we would not allow the bankrupt to release the debt, or to thwart or defeat the suit of the assignees. My opinion, therefore, is, that the assignment made, *personally*, by *Mullett*, after the commission of bankruptcy, was a mere nullity. The law of his *domicil* had deprived him of all power and control over his property, and had appointed administrators in his stead. To test this position, suppose, instead of an assignment made personally by him to the assignees under the commission, as in this case, *Mullett* had made a similar assignment to any other person; I cannot entertain a doubt, that, in such case, we should respect and allow the title of the statute-assignees, so far as to permit them to sue for and recover the *chose in action* here, in opposition to any other assignee whom the bankrupt might appoint. My opinion on this point, therefore, is, that the assignment personally made by *M.*, after the commission of bankruptcy, added nothing to the title of the assignees; because he was, by virtue of the bankrupt laws, rendered incapable of making any transfer of his property.

3. But on the last point in this case, I fully concur with his honor the chancellor, that the payment of the debt in *England*, by the agents of the defendants, being compulsory, and by the judgment of a court of competent jurisdiction, is a bar to this action for the same debt; assuming, as I do, that the payment was *bona fide*, and that the funds were not transferred to *England*, for the purpose of evading payment here. Of such collusion, the case presents no shadow of proof. (*Chevalier v. Lynch*, *Doug.* 170. *Allen v. Dundas*, 3 *Term Rep.* 139. *M'Daniel v.*

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Hughes, 3 *East*, 367. *Embree v. Collins and Hanna*, 5 *Johns. Rep.* 101.)

This last point being decisive of the whole case, my conclusion accordingly is, that the defendants are entitled to judgment.

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SPENCER, Ch. J., YATES, J., and WOODWORTH, J., concurred in opinion, that judgment ought to be entered for the defendants, on the ground, that the compulsory payment in **England* was a good defence in this action; but they declined expressing any opinion on the other points in the case.

Judgment for the defendants.

IN THE MATTER OF THE PETITION OF THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW-YORK, FOR ENLARGING, EXTENDING AND IMPROVING BEEKMAN STREET, IN SAID CITY.

The powers of this court, under the "act to reduce several laws, relating particularly to the city of *New-York*, into one act," passed *April*, 9, 1813, (sess. 36. ch. 86. 2 *N. R. L.* 342—408.) are strictly confined to the authority delegated by the act; and do not come within the general powers and jurisdiction of the court; and in the exercise of the

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powers so given by that statute, the judges act, collectively, as commissioners, rather than as a court. (a)

Where, on petition of the corporation of

New-York, commissioners of estimate and assessment were appointed by the court, in *May*, 1816, pursuant to the act, who made a report, in *January* term, 1819, which was rejected, and new commissioners of estimate, &c. appointed, who took the oath prescribed, and who were nearly ready to report, when the corporation petitioned for leave to discontinue the proceedings, and to withdraw their first petition. and for the appointment of other commissioners of estimate and assessment, for extending and widening the same street, on a different plan from that contained in their first petition, the application for leave to discontinue, &c. was refused.

(a) Vide *Patchin v. Trustees*, 2 *Wendell's Rep.* 377. *Hawkins v. The Trustees of Rochester*, 1 *Ibid.* 53. *The People v. Corporation of Brooklyn*, *Ibid.* 318. In the *Matter of the Mayor, &c. of New-York*, 6 *Con Rep* 571.

fronting on that street ; as the street, by that plan, would be made crooked, and a great part of it would be shut out from a prospect of the water ; that the petitioners had now fixed on a line for the opening and extending of that street, which would, in a great measure, obviate this objection, and, at the same time, add very materially to the accommodation of the new market, &c.

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The petitioners, therefore, prayed, that the proceedings under their former petition should cease and be discontinued, and that they might withdraw it from the files of the court, and that the rules entered thereon be vacated ; and, further, that the court would appoint three new commissioners of estimate and assessment, in order to carry into effect the plan proposed, in their present petition, for extending, enlarging and improving the said street.

The petition was supported by *Edwards* and *D. B. Ogden*, for the corporation ; and opposed by *S. Jones, jr.*, *W. W. Van Ness*, and *Tillotson*, in behalf of different owners of property fronting on the street, or whose interest would be affected by the plan of improvement stated in the petition.

SPENCER, Ch. J., delivered the opinion of the court.

Application is now made, by the corporation of *New-York*, to discontinue the proceedings heretofore had, to withdraw the former petition from the files of the court, and for a rule to be entered for the appointment of new commissioners, to extend *Beekman Street*, in a manner different from that stated in their former application. The reasons urged in the petition are, that the extension of *Beekman Street*, according to the first plan, has given dissatisfaction to the owners of property fronting upon it, as thereby the street *would be made crooked, and the greater part of it would be shut out from a prospect of the water ; that the new lines will, in a great measure, obviate this objection, and will materially add to the accommodation of the market ; and that the additional expense will be by no means commensurate with the objects to be attained by it

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The present application has been opposed by persons owning land fronting on the street, as first proposed to be laid out, and by others, proprietors of lots in the vicinity, upon two grounds ; first, that the court has no power to order a discontinuance of the proceedings, instituted and going on, under the facts of the case ; and secondly, admitting that the court have the power, it ought not to be exercised.

In *May* term, 1816, the corporation applied to us, by petition, to appoint commissioners of estimate and assessment, under the act "to reduce certain laws relating particularly to the city of *New-York*, into one act." (2 *N. R. L.* 408. sec. 177, 178.) Commissioners were accordingly appointed, who reported in *January* term, 1819. That report was set aside, and new commissioners were finally appointed, who have taken the oath prescribed, and have so far completed their duties, as to be ready, or nearly so, to make their report.

The powers possessed by this court, in appointing commissioners,

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in reviewing their report, in referring it back to the same commissioners, or substituting new ones, and in finally confirming their report, are derived wholly from the statute. None of these powers exist independently of the legislative delegation of authority; and they are not incident to our judicial duties. It might be a question how far the legislature can impose such duties on the judges; but it does not admit of a doubt, that, if we do consent to act, we act under a limited and circumscribed authority; and our only power to act being derived from the statute, we possess no powers but such as are expressly given; and those powers must be exercised in the manner designated by the act. It is true, we act collectively, and in term time, and a majority present control the proceedings; but we act as commissioners, and in the same way and manner as we used, individually, to do, under the *insolvent act. The statute is our guide; and we must proceed by the rules, and in the manner, it prescribes. The general powers and jurisdiction of this court, as regards the application now before us, cannot be brought into exercise. They do not apply to such a subject; and we are of opinion, that we went to the full extent of our power, in the case of *Dover Street*. (18 Johns. Rep. 506.) But that case is very distinguishable from the present. We considered the proceedings, in that case, in the same state as if no commissioners had been appointed, and gave leave to discontinue. It will be observed, that the statute gives to the corporation the exclusive right of applying for the appointment of commissioners; and if they decline making the application, the court may well consider the proceeding terminated. In the present case, the commissioners have assumed the trust, and have nearly completed it.

Did we possess the power to grant the application, which we think we do not, we are of opinion, that, under the circumstances of this case, it ought not to be exercised. The application is for leave to discontinue the former proceedings; and if that be granted, then for the appointment of commissioners of estimate and assignment, upon a new and different plan, varying the former lines and widening the street in front of *Fulton market*, from sixty-two feet, the present width, to eighty-seven feet. The motives for this alteration have been already stated. The great object is the accommodation of *Fulton market*. This market, from its spaciousness and the great expense attending its erection, was undoubtedly intended as the resort of a great proportion of the city. The widening the street is not, therefore, to accommodate merely those residing in that vicinity, but the citizens at large. In this view, it would be unjust to subject the owners of lots in that particular district, to the increased expense of between forty and fifty thousand dollars, for the accommodation of the city generally. It has been said, that the commissioners have a discretion to impose this additional burthen on the owners of lots throughout the city. They have so, but they have the power, also, of imposing it on those in the immediate vicinity, and this has been the usual course. At all events, the burthen must *be thrown on the owners of lots, when the benefits to be derived from the proposed widening of the street, are common to all who resort to the market, whether owners of lots

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or not. Justice, then, requires, that for a common benefit the whole city should contribute; and this can be done in no other way, than by a purchase, from the common funds of the city, of the land required for the improvement.

But there is another and very weighty objection. The plan first proposed by the corporation, and decided upon as early as in 1816, has been promulgated, and repeatedly sanctioned by them; and it appears that, upon the faith of the stability of that plan, several persons have made purchases of lots, which will be materially depreciated in value, if the new plan should be adopted and the old one superseded. We cannot consent, without strong and cogent reasons, which, it appears to us, do not exist, that the plighted faith of the corporation should be violated, to the injury of those who, confiding in the stability of a plan which had been deliberately adopted and repeatedly sanctioned, have acted in reference to it, in making purchases at enhanced prices, and who must be severe sufferers, if the proceedings be now superseded. We assume no control over the corporation, upon any subject within their legitimate discretion. They have the primary and exclusive right to decide upon alterations in the streets, as they see fit; but having decided, and this court having acted on that decision, by appointing commissioners, who have entered upon their duties, it is not competent to the corporation to resume the subject, and vacate their act.

We deny the application to supersede the proceedings heretofore instituted, and, as a necessary consequence, the application to appoint new commissioners.

Motion denied.

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BOYCE
v.
THOMPSON.

*BOYCE and others *against* THOMPSON and others.

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NOTICE of the rule to plead, in this and five other causes, in which the names of the parties were different, directed to each of the defendants respectively, and an affidavit of the service entitled in all the causes, was filed, and a default thereupon entered in each cause, by the clerk. A question arose, which was submitted to the court, whether the clerk was entitled to charge fees for six affidavits, or for one only.

Where the titles of several causes, in which the names are different, are included in the same affidavit, or notice, the clerk, on entering the defaults, is entitled to his fees in each cause. (a)

Per Curiam. The clerk is entitled to charge for reading and filing an affidavit in each cause. The parties here are different. In *Jackson, ex dem. Burnett, v. Keller*, all the causes were at the suit of the same lessor of the plaintiff. Besides, the clerk, in this case, must enter a default, founded on an affidavit, in each cause.

(a) *Vid. Law v. Jackson*, 2 *Wendell's Rep.* 209. 18 *Johns. Cas.* 310. *Gelston v. Hoyt*, 13 *Johns. Rep.* 590. *Jackson v. Clark*, 4 *Cow. Rep.* 532. *Jackson v. Gainsey*, 3 *Id.* 385.

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VAN BUSKIRK
v.
BURR.

KING *against* BURR.

An attorney,
or counsel of
the court, who
is a party in a
suit, has no
privilege in re-
gard to the
venue.

THE defendant, in this cause, moved to change the *venue* from the county of *Dutchess* to the city of *New-York*, on the ground that he had material witnesses residing in the latter place; and, also, because, being an attorney and counsellor of the court, and living in the city of *New-York*, he was privileged to have the *venue* where he resided, and where the court was held; and such, he said, was the *English* practice.

Oakley, contra.

Per Curiam. We do not recognize any such privilege of attorneys or counsellors of this court; but shall direct the *venue* to be changed or not, as it may be most convenient to the parties. The defendant, in this case, swears, that *he has material witnesses residing in the city of *New-York*; and the plaintiff's attorney swears, also, to witnesses on his part; but the plaintiff himself has made no affidavit. We grant the motion, on the ground of the defendant's affidavit, as to material witnesses for him in *New-York*.

Motion granted.

VAN BUSKIRK *against* BURR.

It seems, that
the rule as to
the service of
a copy of a
case, at, or be-
fore the time of
giving notice of
argument, does
not apply to
demurrer books.
(a)

E. WILLIAMS, for the plaintiff, moved for leave to strike this cause from the calendar of enumerated motions, on the ground, that no copy of the demurrer book had been delivered to the plaintiff's attorney. He cited *Peck v. Peck*, 14 *Johns. Rep.* 219. *De lamater v. Smith*, 16 *Johns. Rep.* 2. 1 *Dunlap's Pr.* 328. 3 *Johns Rep.* 426. note.

Burr, contra, said, the cases cited did not relate to demurrer books; and, according to the *English* practice, copies of demurrer books were not required to be delivered to the opposite side before argument. (1 *Tidd's Pr.* 460.)

Per Curiam. The rule of practice laid down in the cases cited by the plaintiff's counsel, related only to cases after verdict. There is no decision or rule that requires copies of the demurrer books to be delivered to the opposite party on giving notice of the argument

Motion denied.

(a) Vid. *Bug v. Hunt*, 2 *Wendell's Rep.* 243.

ALBANY,
August, 1822.

OSTRANDER
v.
KNEELAND.

*OSTRANDER *against* KNEELAND.

WRIT of dower, *unde nihil habet*. At the last term, after the demandant had counted, the tenant prayed for an *imparlance* to this term, which was granted.

Kellogg, for the tenant, now demanded a *view*.

Tiffany, contra, objected, that granting a *view* was not a matter of course. The statute (sess. 10. ch. 50. s. 21. 1 N. R. L. 79. 86.) expressly declares, that "a view shall not be granted to the tenant, but in case where a view of the land is necessary." At common law, there was no view in dower *unde nihil habet*. (*Comyn's Dig. tit. View, B. 2 Inst. 481. 2 Lev. 117.*)

In dower *unde nihil habet*, it is not a matter of course to grant a *view* to the tenant; but he must show sufficient cause, by affidavit, to enable the court to judge of its necessity. (a)

Per Curiam. The statute is positive, that a view is not to be granted, unless it be necessary. Sufficient cause must be shown, by affidavit, to satisfy the court of the necessity of granting a view. The motion must be denied.

Motion denied.

(a) The same point was decided in *Visher v. Conant*, 4 Cow. Rep. 396. In general, a view will not be granted, unless boundaries are in question. If, in real actions, the tenant wishes a more definite knowledge of the extent of the demandant's claims, than he can obtain from the court, he should obtain a bill of particulars, as in the action of ejectment. See, also, *The Freeholders and Inhabitants of Gravesend v. Voortuis*, 1 Johns. Cas. 231. *Haynes v. Burt*, 14 MS, and note b, 4 Cow. Rep. 398.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN OCTOBER TERM, 1822, IN THE FORTY-SEVENTH YEAR OF OUR
INDEPENDENCE.

MEMORANDUM.—*During the last vacation (September 19th) Mr. Justice YATES resigned his office of a judge of this court.*

OOTHOUT against THOMPSON.

To an action on the case for a deceit, the defendant pleaded not guilty within six years, on which issue was joined. Held, that proof of an acknowledgment of the fraud, within six years, did not support the issue, or take the case out of the operation of the statute of limitations. (a)

THIS was an action on the case, brought to recover damages, for a *deceit* in the sale of a negro wench. The defendant pleaded, 1. Not guilty: 2. Not guilty within six years next before exhibiting the plaintiff's bill. The plaintiff's writ was tested the 23d of October, 1820. The cause was tried at the Otsego circuit, in September, 1821, before Mr. Justice Woodworth. It appeared from the evidence at the trial, that the defendant, at the time of sale, which was the 4th of October, 1814, recommended the wench as good and sound, and did not mention that she had any defect or disease; and that the plaintiff paid to him the price of 140 dollars. It was proved that the wench was, at the time, subject to lethargic fits, and was of no value.

A witness testified, that in 1815, he heard a conversation between the plaintiff and defendant, in which the plaintiff charged the defendant with cheating him in the sale of the wench, and the defendant did not deny it; but said that he was willing to do what was right.

The judge directed the jury to pass upon the question of fraud only, reserving the question as to the statute of limitations* for the consideration of the court. The jury found a verdict for the plaintiff, for 162 dollars and 72 cents.

Seely, for the plaintiff.

(a) Vid *Bank of Utica v. Childs*, 6 Cow. Rep. 238.

L. Beardsley, for the defendant.

UTICA,
October, 1822.

OOTHOUT
V.
THOMPSON.

SPENCER, Ch. J., delivered the opinion of the court.

This is an action for fraud in the sale of a negro wench, in fraudulently representing her health and capacity for work. The pleas were not guilty, and not guilty within six years. The jury found a verdict for the plaintiff, on the question of fraud. The judge reserved the question on the operation of the statute of limitations, for the consideration of the court. Neither the judge, at the time, nor the parties, could then have considered the facts on that point as doubtful, and as necessary to be passed on by the jury.

James O. Morse, a witness, testified, that he drew the note given by the plaintiff to the defendant, on the sale of the wench. It is dated on the 4th day of *October*, 1814, which he believed to be the true date; and he thought the sale took place on the day the note was executed. He also drew a bill of sale between the parties; and this being in the plaintiff's possession, and not produced, to rectify any supposed mistake in the date of the note, we must conclude, that the sale was on the day the note bears date. The writ, in this case, was tested the 23d day of *October*, 1820; so that there were more than six years between the sale and the commencement of the suit.

In 1815, it appears that the plaintiff charged the defendant with cheating him in the sale of the wench; the defendant did not deny it, but said he was willing to do what was right. The plaintiff's counsel contend, that, from the evidence, it also appears, that the plaintiff did not discover the fraud, until within six years prior to the bringing the suit. As to this last point, it is disposed of, at once, by the case of *Troup v. The Executors of Smith*, decided in *May* term.†

† *Vide ante*,
p. 33.

The question then is, whether, if we consider the defendant as admitting the fraud, within six years, and declaring *he was willing to do what was right, such admission and declaration can take the case out of the operation of the statute.

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The plea was, that the defendant was not guilty within six years; the replication is, that he was guilty within six years, next before the commencement of the suit. Now, it is inconceivable, how an admission of the fraud within six years, can render the party guilty of committing it anew. It was consummated when the sale took place, and any subsequent confession relates back to that period. The confession of the fact does not prove a new fraud, but the first and original one. The plaintiff, in his replication, has undertaken to prove, that the defendant was guilty within the six years: Proving that he had acknowledged the fact within six years, is no proof that the act was done within six years; and it does not support the issue. A case of this kind does not stand upon the same principle, as the acknowledgment of a debt within six years. There, the acknowledgment is evidence of a new promise; here, it is not evidence of a new trespass, and, therefore, there is no analogy between the two cases. This view of the case satisfies me, that, without inverting all the rules of

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logic, (and special pleading has been aptly compared to logic,) it is impossible to say, that a confession of a *tort*, is a perpetration of it; and unless it is, the fact asserted in the replication, that the tort was committed within six years, is not made out, by a confession that the tort was committed more than six years before. But the absence of all authority, either from adjudged cases, or precedents of pleading, that an acknowledgment of a *tort*, within six years, will take the case out of the operation of the statute, would seem to be decisive, that no such principle exists, or has ever been recognized. The contrary doctrine, however, has been decided. In *Hurst v. Parker*, (1 *Barnw. & Alder. Rep.* 92.) decided in the Court of K. B. in 1817, in trespass for breaking and entering coal mines, and taking away coals, there was a plea of the statute of limitations, and replication thereto, in the affirmative. At the trial, no evidence was given to show that the trespass was actually committed within six years; it was held, that evidence of a promise to make compensation, by the defendant, *before the commencement of the action, and when he was threatened with an action for taking away coal, was not sufficient to support this issue, by which the plaintiff was bound to prove the affirmative, that he had a good cause of action within six years before the commencement of the suit. It will be observed, that in the case cited, the promise to make compensation was an admission of the fact charged. I do not cite this case as authority, but merely to show in what light the point before us has been regarded by learned and eminent judges

Judgment for the defendant

BREESE *against* WILLIAMS and BOIES.

No appeal lies from the judgment of a justice's court on a demurrer, or an issue at law, to a court of common pleas, under the act to extend the jurisdiction of justices of the peace. (Sess. 41. ch. 51.)

Where there is an appeal from a justice's court, after a trial on an issue of fact, there should be a new trial by jury, upon the testimony of the same witnesses,

of such issue, taken on proper pleadings in the Court of Common Pleas.

The practice of the Court of Common Pleas of *Washington* county, of proceeding by a general assignment of errors and joinder, is incorrect and improper.

Washington, a writ of error was brought, returnable to this court.

*On the return to the writ of error, the case was submitted without argument

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Per Curiam. The recovery before the justice was for more than \$25, besides costs; but it was upon an *issue in law*, without any *issue in fact*. The 17th section of "the act to extend the jurisdiction of justices of the peace" gives a right of appeal where a judgment shall be "rendered, either upon verdict or without a jury trial, above the sum of twenty-five dollars." (Sess. 41. ch. 94.) According to the scope and provisions of the whole act, it is clear, that the right of appeal applies only to judgments on issues in fact. The statute contemplates and provides for a new trial upon the testimony of the same witnesses only; and requires, contrary to the practice of the *Washington Common Pleas*, that such *issues in fact* shall be *tried by a jury*, upon a proper issue framed, by pleading in the Court of Common Pleas.

By the 21st section of the same act, the remedy, *by certiorari*, is given in all cases, "where an appeal is not provided for" by that act.

This was a case for *certiorari*; (if the justice's judgment was erroneous;) and it follows, that the Court of Common Pleas had no jurisdiction of the cause. The proceedings were *coram non iudice*; and it is of no consequence, that the present plaintiff in error made the appeal to the Common Pleas; because consent cannot confer jurisdiction. The judgment of the Common Pleas is a nullity; and the justice's judgment remains in full force. The writ of error must be quashed.

Writ of error quashed. (a)

(a) *Jackson v. Waltermire*, 7 Cow. Rep. 353. *Adkins v. Brewer*, 3 Ibid. 206. *Ex parte Haywood*, 5 Cons. Rep. 19. *Flower v. Allen*, Id. 654. 2 Rev. Stat. 225, &c.

*ADAMS and BARNUM, Overseers of the Poor of the Town of BANGOR, *against* OAKS.

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IN ERROR, on *certiorari*, to the General Sessions of the Peace of *Franklin* county.

It appeared from the return, that on the 11th of *May*, 1821, a warrant was issued by two justices of the peace, of *Franklin* county, reciting, that one *Cyrus Potter*, a pauper, on the 19th of *March*, then last past, was taken sick and lame, in the town

Where an overseer of the poor, who had been summoned by two justices to appear and answer to a complaint against him for not taking care

of a sick and lame pauper, upon request and notice, &c., according to the 16th section of the act for the relief and settlement of the poor, (1 N. R. L. 279. 284. sess. 36. ch. 78.) (b) neglected to appear, or to show cause, &c., and the justices thereupon issued a *distress warrant*, to levy the amount of the expense of relieving and supporting the pauper, on the goods and chattels of such overseer; and which was, accordingly, executed: *Held*, that he had no right of appeal to the General Sessions of the Peace; such a judgment, by default, being equivalent to a judgment by confession.

Where a father gains a settlement in a town, by the payment of taxes for two years, his infant child, though not residing with him, or under his immediate charge or control, has a *derivative* settlement in the same town with his father.

(b) 1 Rev. Stat. 613.

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of *Bangor*, so that he could not be removed: that in consequence thereof, the town of *Bangor* had incurred expenses to the amount of 30 dollars and 24 cents: that they, the said justices, had adjudged, that his last place of legal settlement was in the town of *Dickinson*, in that county: that due notice had been given to the defendant, one of the overseers of the poor of *Dickinson*, to take care of and provide for said pauper, which he had neglected to do: that, on application of the plaintiffs, they had caused a summons to be served on the defendant, to appear and answer to the complaint: that he had made default in appearance, and had shown no cause, &c.; and thereupon they commanded any constable of the town of *Dickinson* to levy and collect the above sum, of the goods and chattels of the defendant; and to pay the same to the overseers of the poor of the town of *Bangor*; which warrant was executed.

The defendant appealed to the Sessions; and the first question was, whether he was not concluded, by his omission to appear, according to the summons before the justices, previous to the issuing of the warrant. It was admitted, that he had been duly summoned, and had not appeared to show cause before the justices. The Sessions overruled the objection, and decided, that the merits of the whole case were open to inquiry on the appeal.

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An examination was then gone into, by which it appeared, that the town of *Bangor* was formed by a division of *the town of *Dickinson*, in 1812; that *Andrew Potter*, the father of the pauper, was an inhabitant of the original town of *Dickinson*, before the division; and then owned a farm, and resided in that part of *Dickinson* which now forms the town of *Bangor*; that the father was taxed, and actually paid taxes for two years, as a taxable inhabitant, on his land; to wit: one year's tax, *previous* to the division of the town, which he paid to the collector of *Dickinson*, in 1811; and one year's tax, which was assessed *after* the division, and paid by him to the collector of *Bangor*, in 1815. It also appeared, that the father had removed from *Bangor* into *Dickinson*; and it was admitted, that he was assessed *there*, in 1816, and paid the tax there in 1817. The plaintiffs also proved, by the collector of *Dickinson*, that the father was assessed there in 1818, and had paid the tax in 1819; but this testimony was objected to, on the ground, that the assessment roll and tax list ought to be shown; and the objection was overruled. The pauper was of full age, (about 22 years old,) when he became so chargeable, and it appeared, that when he was 17 years old, his father executed an instrument of writing to him, whereby, for the consideration of \$50, he released his son from all claim to his future services, and permitted his son to work and contract for himself, and go where he pleased, relinquishing all parental rights and control over him.

The son had, accordingly, roved into *Vermont* and *Canada*, and was a vagabond, when taken sick and lame in *Bangor*.

The Sessions quashed the warrant of distress, and ordered the overseers of *Bangor* to refund to the appellant 33 dollars and 82 cents; being the amount of the money collected on the warrant,

with interest and fees; and further ordered, that the respondents pay to the appellant 17 dollars and 65 cents, for the costs of the appeal.

On the return to the *certiorari*, the cause was submitted to the court, without argument.

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PLATT, J., delivered the opinion of the court.

The 17th section of the "act for the relief and settlement of the poor," (1 N. R. L. 279. 285.) (a) gives an appeal to "every person, who shall think himself aggrieved by any judgment or order of any justice or justices," &c. But I incline to the opinion, that the appellant was concluded from his appeal by omitting to appear and defend himself before the justices who issued the warrant. In making an adjudication, that the pauper was settled in a particular town, with a view to an order of *removal* merely, no notice is required to be given; it is a proceeding *ex parte*. The Court of Sessions is the first *forum* in which the matter can be litigated by the overseers of the adverse town. But where the proceeding is with a view to a *distress-warrant*, for the sustenance of the pauper, the reason of the case is varied. In directing the distress-warrant to issue in such case against the overseer of the town properly chargeable, the statute is silent as to previous notice by summons; (1 N. R. L. 284. s. 16.) (a) but, on common law principles, such notice is held to be necessary, before the overseer can be personally charged by process in the nature of an execution. If the appellant had appeared on the summons, which was to show cause why a warrant of distress should not issue against him, he would not have been confined, in making his defence, to the mere fact that he was not an overseer of the poor, or that he had already paid the sum required. He might have defended himself, on the ground, that the pauper had no legal settlement in the town of *Dickinson*, of which he was overseer. When the law allows him the privilege of being summoned in such case, it imposes on him a corresponding duty; which is, that if he has any ground of defence, he shall appear and prove it, in the primary court, having cognizance of the matter. Suppose the defence had been, that no expense had been incurred on account of the pauper, or that he (the overseer) had already paid such expense; can it be tolerated, that he may neglect to appear, and after the warrant of distress has been levied, and the money paid over, then litigate the whole matter on appeal? It would pervert the right of appeal, which implies an actual previous litigation in the tribunal appealed from. To allow him to pass by the inferior tribunal, unnoticed, would be to convert the *appellate* into an *original* jurisdiction. A judgment by default, for want of appearance, is, for this *purpose, equivalent to a judgment on confession. This doctrine is well settled in the higher courts, without any statute provision for that purpose; and I perceive no reason, why it should not be applied to all judicial proceedings, where an appeal is allowed.

If I am correct in this point, it is decisive of the case, in favor

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of the plaintiffs in error. But on the merits, as disclosed in the Sessions, I think the judgment of the court below was erroneous. The proof shows, that the father of the pauper gained a settlement, by paying taxes for two years, in *Dickinson*, after the division of that town; and, under the circumstances of the case, the pauper had a *derivative* settlement, *identified* with that of his father; and the son had acquired no other. The contract, whereby the father attempted to release his infant son from all parental charge and control was absurd, and can have no effect upon the question before us. The law determines the relation between a father and his infant children, which it is not in their power to change.

The conclusion is, that the judgment of the Court of General Sessions ought to be *reversed*.

Judgment of the Sessions reversed.

TUTHILL against DAVIS.

An endorser of a promissory note, in a suit against the maker, is a competent witness, to prove that it was given to the plaintiff. [* 286]

tiff to take up two other notes endorsed by the witness to the plaintiff, and on which two notes the plaintiff had received more than the legal interest. (a)

A mere change of securities for the same usurious loan, to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. As where a new note, without any new consideration, is given to take up a note in the hands of the original party to the usurious contract, it is tainted by the illegal consideration of the first note. (b)

THIS was an action of *assumpsit* on a promissory note, made by the defendant to *Abner Cunningham*, and by him endorsed to the plaintiff. The cause was tried at the *Orange* circuit, in *April* last. After the signatures of the maker and endorser were proved, *A. Cunningham*, the endorser, was called by the defendant's counsel as a witness. The plaintiff's counsel objected to his competency; but he was *admitted by the judge, and stated, that the note in question was given to take up a former note made by *Nathaniel Sands* to him, and endorsed to the plaintiff, and also a note made by *James Cunningham* to him, and endorsed to the plaintiff, on which notes five per cent. above the legal interest was taken by him, though no new or additional premium was taken on making the note in question. That the two notes above mentioned were prosecuted by *James Everett*, the attorney of the plaintiff, against the makers; and the witness, acting for himself and the defendants, delivered the note in question either to the plaintiff or *E.*, in settlement of those suits. The plaintiff's counsel then produced an account stated, in which the note in question, annexed to the account, was received in part payment of judgments against *James Cunningham* and *Nathaniel Sands*; and on which account, signed by *John Everett* for *James Everett*, was a certificate by *J. E.* that the note annexed was the same referred to in the account, and was received in part payment of the judgments mentioned in the account. The defendant's counsel objected to the evidence, on the ground that the records of the judgments mentioned in the account ought to be produced; and the judge on that ground rejected the evidence, and directed a verdict for the defendant.

(a) *Stafford v. Rice*, 5 *Cow. Rep.* 23.

(b) *Vid. Burreto v. Snoden*, 5 *Wendell's Rep.* 181. *Powell v. Waters*, 8 *Cow. Rep.* 669.

It was agreed, that if the court should be of opinion that *Abner Cunningham*, the endorser, was properly admitted as a witness, and that the account and certificate of *John Everett* were properly rejected, the verdict was to stand; otherwise, a new trial was to be granted.

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Jackson and Case, for the plaintiff.

Wisner, for the defendant.

PLATT, J., delivered the opinion of the court.

In regard to the admissibility of *Cunningham*, the endorser, as a witness for the defendant, I have no doubt that he was competent, and was properly admitted. His testimony went to prove, that after he had endorsed the first notes, they were used to obtain a usurious loan, by passing them to the plaintiff, who was himself the usurer, and of course had notice that those notes were infected when he so received them. If the decision in the case of *Winton v. Saidler* (3 Johns. Cas. 185.) be still considered as sound law, it has no application to this case: there, the plaintiff was a *bona fide* holder, for valuable consideration, without notice of the previous usury between the former parties to the note. *Skelding v. Haight*, (15 Johns. Rep. 275.) and *Powell v. Waters*, (17 Johns. Rep. 176.) give the rule for this case.

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As it appears, by the testimony of *Cunningham*, that the note now in question was given to renew and take up the former usurious notes, then in the hands of the plaintiff, the original party to the usurious contract, without any new consideration, but including the extortionate interest of the original loan, this last note is equally infected, and of the same illegitimate progeny as the first notes; and a mere change of securities, for the same usurious loan, to the same party who committed the usury, or to a party who had notice of it, can never purge the original consideration, or give a right of action. In *Cuthbert, &c. v. Haley*, (8 Term Rep. 390.) it was decided, that if *A.*, for a usurious consideration, give his note to *B.*, who transfers it to *C.* for a valuable consideration, without notice of the usury, and afterwards *A.* gives a bond to *C.* for the amount of the note, the bond is good. I recognize that case as sound law: and the pivot on which it turned was, that the new security was given to a *bona fide assignee*, who had paid a valuable consideration for the usurious note, without notice of the usury. *Ellis v. Wares* (Cro. Jac. 33.) also supports the same doctrine.

But in this case, the plaintiff attempted to prove that judgment had been rendered in an action on the original notes, in order to show a *new consideration* for the last note. If this had been proved, it would have protected the plaintiff in this suit; because, after a regular judgment in an *adverse* suit, all parties are precluded from an allegation of usury in the contract on which such judgment has been rendered. The right to recover in this action depended, therefore, on the fact, whether a judgment had been obtained in the suit on the first notes; and there is no ground for

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*contending that the mere certificate of *John Everett* was competent evidence of that fact. An exemplified copy of the judgment was undoubtedly the proper evidence. The judge at the circuit, in my opinion, ruled correctly on both points; and the defendant is, therefore, entitled to judgment on the verdict in his favor.

Judgment for the defendant.

MARVIN against M'CULLUM and another.

A promissory note has no legal inception, until it is delivered to some person, as evidence of a subsisting debt.

A note made payable to A., or bearer, but never delivered to A.; but passed by the maker to H., as a security for a usurious loan, is usurious and illegal in its inception. (a)

ASSUMPSIT on a promissory note, dated *October 13, 1820*, made by the defendants, *M' Cullum* and *Merriam*, for 200 dollars, payable on the first of *January, 1821*, to *James Averill*, or bearer, with interest. Plea, *non assumpsit*. The cause was tried before Mr. Justice *Woodworth*, at the *Otsego* circuit, in *September, 1821*. The plaintiff proved the making of the note. The defendant called *James Averill*, the payee of the note, as a witness, who testified that he never owned the note, that it was never delivered to him, nor in his possession, and that he never transferred it to any person; but he said, that before the date of the note, he had agreed with the defendants that they should make the note, and he was to give them 100 dollars in cash, and 100 dollars in leather; but the note was never brought to him. *John A. Hudson*, another witness for the defendants, testified, that he bought the note of *Merriam* before it became due, for the full amount, and paid for it, part in money, and part in other property. The defendants then offered to prove, that *Hudson*, when he purchased the note, was apprized, that it was made to raise money for the benefit of *Merriam*, and that *M' Cullum* signed the note, without any consideration, merely to give it credit; and that *Hudson* bought the note at a discount from the sum due thereon, at the time of the purchase; but this evidence, which was offered to prove the note usurious, was rejected by the judge. *Hudson* then testified, that the note was sold and transferred by him to the plaintiff, before it became due, for its full value.

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*The judge charged the jury, that "inasmuch as it appeared, that the plaintiff had bought the note and paid the full amount of it, before it became due; and as it did not appear, that he had any notice or knowledge of the purpose for which the note had been made; and it not appearing that the note was usurious in its inception, but was given for the purpose of being passed to *Averill*, for its full value, the plaintiff was entitled to recover:" And the jury, under the direction of the judge, found a verdict for the plaintiff, with leave to the plaintiff to move the court to set aside the verdict, and for a new trial, on a case containing the facts above stated.

Starkweather, for the defendants.

(a) Vid. *Bank of Rutland v. Buck*, 5 *Wendell's Rep.* 66. *Powell v. Waters*, 8 *Cow. Rep.* 669. *Mitchell v. Culver*, 7 *Cow. Rep.* 336. *Mechanics' and Farmers' Bank v. Schuyler*, *Ibid.* 337. note. *Bank of Shenango v. Hyde*, 4 *Id.* 567

Van Vechten and Baldwin, for the plaintiff.

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PLATT, J., delivered the opinion of the court.

With deference, it seems to me, the judge was mistaken in excluding the evidence offered by the defendants. The reason for rejecting that evidence may be collected from the charge to the jury, to wit: That "*the note was not usurious in its inception, but was given for the purpose of being passed to Averill, for its full value.*"

The mistake, I apprehend, consisted in the misapplication of the terms "*purchase*" of the note; and the "*inception*" of the note. By its *inception*, I understand, *when it was first given; or when it first became the evidence of an existing contract.* It has no legal inception until it is *delivered* to some person, as evidence of a *subsisting debt*. Merely writing and signing a note, and retaining it in the hands of the drawer, forms no contract. No person had then a right of action on it, any more than if it had been blank paper. This note was drawn payable to *Averill* or *bearer*; but it never was delivered to him, nor had he ever any interest in it. As to him, therefore, it had no inception. His name was used like that of a *fictitious payee* in bank notes: And it had no effect whatever, in regard to the question now before us. When was the inception of this note? In my judgment, it had its inception, when it was delivered by the makers, or either of them, to *Hudson*, as evidence of a contract. Until then, *no contract existed in regard to the note. And if, as the defendants offered to prove, the agreement between *Hudson* and the makers was *usurious*, and the note was first given to *H.* as security for a usurious loan; then it follows, that it was corrupt and illegal in its inception. The counsel for the defendants called it *purchasing* the note by *Hudson*; which was incorrect phraseology, and was calculated to mislead. He did not buy the note as evidence of a previously existing debt, which is the correct sense of the term: On the contrary, he lent money, and took this note from the makers, who then issued it, for the first time. As well might it be said, that a man buys a note, who sells a horse, and takes the note of the purchaser for the price. (*Munn v. Commission Company*, 15 *Johns. Rep.* 55. *Powell v. Waters*, 17 *Johns. Rep.* 176.) We are, therefore, of opinion, that a new trial ought to be granted.

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New trial granted.

WHEATON *against* HIBBARD.

IN ERROR to the Court of Common Pleas of *Onondago* county. *Hibbard* brought an action of *assumpsit* against *Wheaton* in a

A borrower, who has paid more than the legal rate of interest, is not confined to the remedy given by the statute to prevent usury; but may bring an action of *assumpsit* for money had and received, at common law, to recover the excess of interest; but to entitle him to maintain the action, he must show that he has paid, or offered to pay, all the principal really lent, with the lawful interest.

Where the lender does not raise the objection at the trial, that the principal and legal interest had not been paid by the plaintiff, but rests his defence on other and different grounds, the court will, from his silence, intend the fact of such payment; and he cannot afterwards make the objection, when the cause comes up for review, on appeal or writ of error.

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justice's court. The declaration contained the common money counts, to which the defendant pleaded *non assumpsit*, with notice that the money received by the defendant was for excess of interest above the lawful rate of interest. The justice gave judgment for the plaintiff for thirty-five dollars, damages, and three dollars and sixty-nine cents, costs. *Wheaton* appealed from this judgment to the Court of Common Pleas, pursuant to the act. (Sess. 41. ch. 94.) On the return to the appeal, in the Court of Common Pleas, a jury was summoned to try the issue between the parties. The jury found a special verdict, stating that, on the first of *April*, 1816, *H.* paid to *W.* thirty-five dollars for interest, over and above the lawful *rate of interest, on one hundred dollars for one year, then owing from *H.* to *W.*, for the forbearance of one hundred dollars for one year following, and which sum of thirty-five dollars *W.*, corruptly and usuriously, against the form of the statute, &c., extorted and received from *H.* for excess of interest above the legal rate of interest, &c.; and that, on the second of *April*, 1817, *H.* paid *W.* ten dollars for excess of interest over and above the legal rate of interest on two hundred dollars, for the forbearance of the said sum for one day, and which was extorted and received from him by *W.* corruptly and usuriously, contrary to the form of the statute, &c.; and that both of the said sums of money were paid by *H.*, and corruptly and usuriously received by *W.*, more than one year before the commencement of the said suit by *H.* against *W.* before the justice, and from whose judgment there was an appeal to the Common Pleas, &c.; but whether or not, upon the whole matter, the said *W.* did assume and undertake to repay the said *H.* the forty-five dollars so corruptly and usuriously received by him, the said *W.*, or whether an action of *assumpsit* will lie in favor of *H.* to recover the said money, &c., the jury are ignorant, &c.; leaving the questions of law for the court to decide. The Court of Common Pleas gave judgment for the appellee, *H.*, for forty-five dollars, damages, and twenty-six dollars and ninety-six cents, costs. And on this judgment a writ of error was brought, returnable to this court.

V. Birdseye, for the plaintiff in error, made the following points:

1. That the damages exceed those laid in the plaintiff's declaration.

2. That it did not appear, that an appeal was taken from the justice's judgment, or notice thereof given.

3. That the plaintiff below recovered less than fifty dollars, and yet recovered costs.

4. That the plaintiff's action should have been debt, not *assumpsit*.

5. That the action was brought more than one year after the payment of the money.

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6. That there was no *assumpsit* proved, and no grounds *are stated by the jury, from which an *assumpsit* could by law be implied.

He cited statute 1 *N. R. L.* 64. (a) *Bac. Abr* tit. *Usury*, G.

(a) 1 *Rev. Stat.* 771.

Bac Abr. tit. Statutes. 13 Johns. Rep. 191. 1 Term Rep. 53.

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Kellogg, contra. He cited 2 Comyn on Cont. 113. 1 Boss. & Pali. 296. Doug. 696. note. Cowp. Rep. 200. 3 Inst. 150. 3 Mass. Rep. 101. Str. Rep. 915.

SPENCER, Ch. J., delivered the opinion of the court.

The recovery in the Common Pleas was more than in the justice's court. The counsel for the plaintiff in error give up that objection, and also an objection as to costs, these points having been decided against him. The points reserved by the special verdict, and submitted to the court, are, 1st. Whether an action of assumpsit will lie after a year, in favor of the person paying usurious interest; and, 2d. Whether the law, under the facts found, presumes a promise. The plaintiff's counsel have raised a third point, that the action could not be maintained without proving payment of the money actually due.

The statute to prevent usury, (1 N. R. L. 64.) (a) after regulating the rate of interest, authorizes the party paying usurious interest, to sue for and recover the excess above seven per cent., within one year then next, with costs of suit, in an action of debt, founded on the act; and it prescribes a succinct form of declaring. It then provides, that if the person paying usury shall not, within the time aforesaid, really and *bona fide*, commence his suit for the money so paid, or suffers it to be delayed or discontinued, then it shall be lawful for any other person, within one year after such neglect, to sue for and recover the same, in manner aforesaid, one moiety whereof is given to such person, and the other moiety to the use of the poor of the town in which the offence is committed.

This provision is peculiar to our statute. By the 12 Anne, ch. 16. the party receiving more than the legal rate of interest, forfeited the treble value of the moneys or other things lent. It is contended, that the person who pays *above the legal rate of interest, is confined to the statute remedy, and that he must not only sue in an action of debt, but that the suit must be within one year, or he is forever precluded. Now the principle is, that where a party has a remedy at common law for a wrong, and a statute be passed, giving a further remedy, without a negative of the common law remedy, expressed or implied, he may, notwithstanding the statute, have his remedy by action at common law. (1 Com. Dig. *Action on Statute, C.*) There are no words in the statute, either expressly or impliedly, negating the common law remedy. The injured party cannot have both remedies, and if he neglect to pursue the statute remedy for more than a year, his right of action at common law would be suspended during the second year, for, peradventure, a third person may prosecute. But, in the present case, the excessive interest was received in 1816 and 1817. It was incumbent on the defendant to show, had the fact been so, that he had been sued within the second year; and not having

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(a) 1 Rev. Stat. 771.

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shown this, the statute remedy is gone. It is undeniable, that a party who has paid excessive interest may, at common law, recover the excess, in an action for money had and received. The law considers the borrower rather as a victim than an aggressor. The statute prohibits usury, in order to protect needy and necessitous persons from the oppression of usurers, who are eager to take advantage of the distresses of others, and who violate the law only to complete their ruin. In such a case, the maxim of *potior est conditio defendentis* has never been applied. But the party injured cannot recover any part of the principal and legal interest; and to entitle him to maintain the action, he must show that he has done all that equity requires. (*Bacon, Usury*, G. 1 *Term Rep.* 153.) In this case, had the objection been made that the principal was unpaid, the defendant in error ought to have proved such payment. But the objection was not made; and it seems to me, that when the cause has been litigated on other and different grounds, we are to intend, by the silence of the plaintiff, in not making the objection, that the fact is, that the principal and interest have been paid. It is a salutary rule, not to suffer an objection to be made when the case comes up for review, *which might have been obviated, had it been made at the proper time. The principle is sound, that the court can intend nothing in a special verdict, but what is found by the jury. (1 *Wils.* 55. 1 *Caines*, 64.) This case I conceive not to be within the rule. The excess beyond legal interest was money to which the plaintiff in error had no right; it belonged to the defendant in error; and he shows a state of facts entitling him to it. Now, what rebuts the justice and equity of his case? What deprives him of his right to regain what has been wrongfully taken from him? The fact, that the principal and interest have not been repaid. That, then, is matter of defence to be shown on the other side; and as the negative could not be proved, it would be enough to state the objection, and throw it on the party to prove payment. But when the defence is not made, nor the objection stated, the inference is, that the fact did not exist. This is not inferring a fact; but it is rebutting a presumption. We are of opinion, therefore, that the judgment must be affirmed.

Judgment affirmed.

BRIGGS against THOMPSON and others.

Where a judgment is fully paid, and the plaintiff, on application of the defendant, refuses to acknowledge satisfaction, the court will compel him to enter satisfaction at his own expense, and to pay the costs of

M'CLELLAN, for the defendants, moved, that the plaintiff cause satisfaction of the judgment to be entered up on the record in this cause, and that he pay the costs. It appeared from the affidavit, which he read, that on the 15th of *August*, 1815, the defendants paid to the plaintiff's attorney the full amount of the judgment which had been entered up that day; but no satisfaction was entered. On the 16th of *August* last, one of the defendants applied to the plaintiff's attorney, for that purpose, who advised *William Shotwell*, the real plaintiff, (the suit having been an action

of trespass brought by *Briggs*, who was his tenant,) that satisfaction ought to be entered. *W. S.* wrote to the plaintiff, that the judgment had been paid, and that there was no *objection to the entry of satisfaction. The defendants' attorney then applied to the plaintiff, *Briggs*, and showed him the receipt in full, and the letters of the attorney and *W. S.*, and requested him to acknowledge satisfaction; and offered to pay all the expenses of making the acknowledgment before a proper magistrate; but the plaintiff absolutely refused to comply with the request, or to acknowledge satisfaction. The notice of this motion was given by *T.* for himself and his co-defendants, and served on *Briggs*, the plaintiff.

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Per Curiam. Take your rule, that the plaintiff acknowledge satisfaction of the judgment, and that he pay the costs, together with the costs of the motion.

Motion granted. (a)

(a) Vid. *Mumford v. Stocker*, 1 Cow. Rep. 176.

BROOKS *against* HUNT.

CADY, for the plaintiff, moved to amend the judgment record in this cause, by striking out that part of the judgment which awarded costs to the defendant. He said, that this was an action of *audita querela*, in which there was a *demurrer*, and judgment given thereon for the defendant, in *August* term last, with costs.

He contended, that in *audita querela*, no costs can be recovered by either party: 1. Because, costs are only recoverable by statute; and the statute (1 N. R. L. 343. sess. 36. ch. 96. sec. 1, 2.) (b) gives costs only in cases where damages are given. 2. Because *audita querela* is a suit in which no damages are recoverable by either party. It is purely remedial, and in the nature of a bill in equity. (2 *Sellon's Pr.* 358. *Dyer*, 194.)

If the defendant is entitled to costs at all, it must be under the 12th section of the act, which declares, "That if any person shall prosecute, in any court of record, any action wherein, upon any *demurrer* by either party to the action, *judgment shall be given for the plaintiff or demandant; or if, at any time after such judgment, the plaintiff or demandant shall sue any writ of error on the judgment, and the said judgment shall be affirmed, or the writ of error shall be discontinued, or the plaintiff nonsuited therein, the defendant, in such action of writ of error, shall recover costs against the plaintiff or demandant, and have execution for the same as aforesaid." The language of this section is somewhat ambiguous, and ought to be construed so as to harmonize with the first and second sections of the act; otherwise, a defendant may recover costs in a case in which no damages could be given, and the plaintiff, had he succeeded, could not have recovered costs, which could hardly have been the intention of the legislature.

Where judgment is given for the defendant, on a *demurrer*, in an action of *audita querela*, he is entitled to costs against the plaintiff under the 12th section of the act. (Sess. 36. ch. 96. 1 N. R. L. 343.) (b)

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other on the case. The judgment was by default, and damages were assessed generally, on a writ of inquiry; so that, if the first count were proper, it is impossible to ascertain what damages were given on the first count. The second count is not for any "misconduct or default in his office," but merely for a breach of promise. It is not within the terms of the undertaking of the sureties of the sheriff, that they are to be liable for any thing but his neglect of his official duty. The second count is, also, deficient, in not describing the process on which the sheriff received the money, the time of the arrest, or in what manner the sheriff has been guilty of misconduct in his office. The time laid in the second count, of the promise to pay, is in *October, 1820*, more than four years after the defendants had ceased to be bail.

J. C. Spencer, contra.

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Per Curiam. As to the first point, there seems to be no settled rule of practice; but it appears to be highly reasonable and just, that there should be notice to the sureties, who may have good cause to show why execution should not issue against them. We deny the present motion, without *costs; but we lay it down as a rule, in future, that notice must be given. We are of opinion, that *interest* may be collected on the execution, against the sheriff and his sureties, if the judgment was such as would carry interest under the statute. We will stay the proceedings until the next term, to give the party an opportunity of producing an affidavit of merits.

Rule accordingly.

THE PEOPLE *against* MATTHEWSON and WOOD, impleaded with DAVIS.

The party at whose instance a sheriff's bond is sued, may, after judgment against the sheriff and his sureties, move to have the amount of his original judgment against the sheriff, with *interest* and costs, levied on the execution, to be issued against the sheriff and his sureties, without giving a previous notice of such motion to the defendants.

ON producing the record in this cause, it appeared, that the action was brought on a bond given by *John S. Davis*, late sheriff of the county of *Oswego*, and his sureties, for the due performance of his duty as sheriff, pursuant to the statute; and that the same had been prosecuted, by leave of the court, at the instance of *Barent Walradt*.

Reynolds, in behalf of *Walradt*, now moved, that the sheriff of the county of *Oswego* be directed to collect, on the execution to be issued in this cause, the sum of 169 dollars and 93 cents, being the amount of the original judgment against *J. S. Davis*, at the suit of *B. Walradt*, for the default of the said sheriff, in his office, &c., together with the *interest* thereon, from the 24th of *October, 1821*, the day when the said judgment was docketed, and the costs of suit; and that the amount be paid over to the said *B. W.*

Per Curiam. As this suit was brought at the instance of *Walradt*, on whose motion the action was brought on the sheriff's

cond, it is, in that respect, distinguishable from the case of *The People v. Birdsall and others*, just now decided. This application, therefore, may be made, without giving previous notice to the defendants; and we grant the rule.

Rule granted.

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***JACKSON, ex dem. CORSON and SEBRING, against CAIRNS and COLES.**

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EJECTMENT for lands, &c. in *Northfield*, in the county of *Richmond*, tried before the chief justice, on the 31st of *May*, 1821.

Jacob Corson died seised and possessed of the premises in question, and other real estate, in 1772, leaving three children: *Mary*, the wife of *John Simonson*; *Cornelia*, wife of *Ernest Linder*, and, after his death, wife of *James Duffie*, and, after his death, wife of *Gozen Ryers*; and *Elizabeth*, wife of *Jacob Sebring*. *Mary*, the wife of *Simonson*, died in 1779, leaving two children, *Cornelia*, one of the lessors of the plaintiff, and *John Simonson*, who is now living. *Cornelia*, at the age of 19 years, married *Daniel Corson*, in 1791, from whom she was legally divorced on the 4th of *December*, 1810, by a decree of the Court of Chancery, dissolving the marriage. *Cornelia Ryers*, before her last marriage, and whilst she was the wife of *Duffie*, occupied, with her husband, the premises in question. She died on the 13th of *July*, 1795, without issue, and *G. Ryers* died in *January*, 1802. *Jacob Sebring*, husband of *Elizabeth Sebring*, the other lessor of the plaintiff, who was married before the death of her sister, *Mrs. R.*, died on the 4th of *August*, 1803. It was proved, that *Gozen Ryers* was in possession of one half of the *Corson* property, including the premises in question, from the time of his marriage with *Cornelia C.*, until his death, and that his son, *John P. Ryers*, held possession of it, until after the sale of it to the defendant, *Cairns*, on the 7th of *August*, 1805. *G. Ryers* claimed the property as his own, by purchase from *Terence Reilly*; and such claim was asserted before and after the death of his wife. Since the sale to *Cairns*, he has been in possession. The other half of the *Corson* property had been held by *John Simonson*, and *those claiming under him, for many years, and as far back as the witnesses could remember. *G. Ryers* built several houses on the part possessed by him, in one of which *J. Johnson* lived in 1796.

The defendants set up an adverse title and possession, and gave in evidence; 1. A deed from *Jacob Sebring, jun.* and *Elizabeth*, his wife, dated *April 2*, 1776, to *John Simonson*, and *James Duffie*, for 600 pounds, in fee, of one third of all the real estate, &c. of which *Jacob Corson, jun.* died seised, which deed was duly acknowledged and recorded. 2. A deed from *Terence Reilly* to *Gozen Ryers*, dated *January 30*, 1788, in fee, of the one half of all the real estate, &c. of which *J. C. jun.* died seised, for the

Where a wife joins with her husband in the execution of a deed of her own lands, but does not acknowledge the deed before a magistrate, according to the statute, her right is not divested (a)

Where the husband was seised of lands in right of his wife, and the wife died in 1795, and the husband afterwards continued in possession of the land, claiming it as his own, and making permanent improvements thereon, and, in 1800, executed a mortgage of the land as his own: Held, that the husband, after the death of his wife, was a tenant at sufferance; and his

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continuance in possession was not adverse or hostile to the true owners, or heirs of the wife.

A party having right to land, has, in every event, twenty years to make an entry; and if under legal disability when his right of entry first accrued, he may,

though twenty years have elapsed, bring his action within ten years after his disability is removed.

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consideration of 1000 pounds. 3. A mortgage of the premises in question, from *Gozen Ryers*, dated *September 21, 1792*, to the *New Loan Officers* of the county of *Richmond*, which mortgage was paid off by *Cairns*, on the 3d of *April, 1808*. 4. A mortgage of the same premises, by *Gozen Ryers*, to *Richard Waln*, to secure the payment of 2000 dollars, dated *June 5, 1800*; and the proceedings to foreclose the mortgage, in chancery, and a deed of a master, under a decree of foreclosure and sale, dated *August 5, 1805*, to *Cairns*, for 6300 dollars. 5. A mortgage from *John P. Ryers* to *Richard Waln*, of thirty-five acres of the premises, for securing the payment of 1500 dollars, dated *July 1, 1802*.

It appeared, that the declaration in the cause was served on the defendant, *Coles*, the 17th of *May, 1817*.

To rebut the defence of adverse title, the plaintiff gave in evidence a deed, dated *January 23, 1788*, from *Gozen Ryers*, and *Cornelia*, his wife, to *Terence Reilly*, for one half of all the lands, &c. of which *Jacob Corson, jun.* died seised, but which was never acknowledged by the wife; nor was it proved and recorded until *October 27th, 1812*; and was, therefore, read in evidence as the deed of *G. Ryers* only.

A verdict was taken for the plaintiff, for three fourths of the premises in question, subject to the opinion of the court, on a case, with leave to either party to turn the same into a special verdict.

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**Van Wyck* and *McGaraghan*, for the plaintiff, contended, 1. That no adverse possession commenced until after the purchase by *Cairns*, under the sale on the foreclosure of the mortgage, in *August, 1805*.

2. That the pretended title derived from *Terence Reilly*, was a nullity, *Cornelia Ryers* never having acknowledged the deed to him.

3. That a husband cannot, by an act of his, disseise his wife of her lands, or work a discontinuance of her estate.

4. That *Cornelia Corson*, one of the lessors, having brought her action within ten years after the death of her husband, was entitled to one fourth; and the other lessor, *Elizabeth Sebring* having also brought her action within twenty years from her husband's death, was entitled to recover one half of the premises.

They cited *Adams on Ejectment*, 38. note. 2 *Salk.* 423. 2 *Lord Raymond*, 830. *Buller's Nisi Prius*, 130. 2 *Caines's Rep.* 174. 3 *Johns. Cases*, 109. 124. 128. 1 *Johns. Rep.* 156. 4 *Johns. Rep.* 202. 7 *Johns. Rep.* 157. 9 *Johns. Rep.* 163. 174. 10 *Johns. Rep.* 143. 13 *Johns. Rep.* 555. 553. 16 *Johns. Rep.* 110. 18 *Johns. Rep.* 361.

G. Griffin, for the defendants, contended, 1. That it was to be presumed, under all the circumstances of the case, that *Gozen Ryers*, at the time of his death, had a legal title to the premises in question.

2. That there having been an adverse possession of more than twenty years, *Elizabeth Sebring* was barred, in consequence of her not having prosecuted her claim within ten years after the

termination of her coverture. He cited *Jackson v. Newton*, 18 *Johns. Rep.* 361. *Jackson v. Thomas*, 16 *Johns. Rep.* 93. *Slywright v. Page*, 1 *Leo.* 166. *Van Dyck v. Van Beuren*, 1 *Caines's Rep.* 89. 91. *Ballant. on Limit.* 23, 24. 6 *Comyn's Dig.* tit. *Seisin*, F. 1. *Co. Litt.* 57. b. 6 *East*, 80. 4 *Taunt. Rep.* 826.

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SPENCER, Ch J., delivered the opinion of the court. It was decided by this court, in the cases of *Jackson v. Sears*, (10 *Johns. Rep.* 435.) and *Jackson v. Stevens*, (16 *Johns. Rep.* 110.) that a grant in fee, by the husband and wife, of *the wife's lands, the deed not being acknowledged by her according to the statute, passed only the husband's interest, and that the estate, after his death, reverted to her and her heirs. At the common law, the alienation of a husband, who was seised in right of his wife, worked a discontinuance of her estate. This was remedied by the statute of 32 H. VIII. ch. 28. s. 6., and which has been reenacted here, (1 *Greenleaf's Ed. L. N. Y.* 393.) and continued in the successive revisions of the statutes. The act was passed the 8d of March, 1787. The 2d section declares, that no fine, feoffment, or other act, made or done by the husband only, of lands, the inheritance or freehold of the wife, during coverture, shall work a discontinuance, or be prejudicial or hurtful to the wife, or her heirs; but that the wife, and her heirs, shall and may enter into all such lands, and hold the same according to their rights and titles therein, as if no such fine, feoffment, or other act, had been done.

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The deed to *Reilly*, in January, 1788, although the wife joined in it, was not within this statute, for it was an act entirely null and void as to her. The statute intended, where the conveyance was to divest her right, that she should aliene according to law, that is, by a deed acknowledged by her before a magistrate thereto authorized. That deed, then, operated only as a deed from *Ryers*, and did not divest the right of his wife, or her heirs.

When, therefore, *Reilly* reconveyed to *Ryers*, the latter acquired no new right, but was merely reinvested with his former estate, the right to the possession during the coverture. The mortgage to the new loan officers, in 1792, by *Ryers*, is open to the same remarks. It had no effect on the wife's rights.

It becomes wholly unnecessary to consider the effect of *Ryers's* mortgage to *Waln*, in June, 1800, for this action was brought within seventeen years thereafter.

Cornelia Ryers died in July, 1795, and it becomes a question, whether the continuance of *G. Ryers* in possession from that time until his death, in January, 1802, acquired the character of a hostile and adverse possession as against the heirs of his wife. It is asserted by the defendant's counsel, that his possession became hostile and adverse immediately *after the death of his wife, and they rely on the facts of his having erected buildings on the premises as early as 1796, and his claiming the premises to be his property.

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We must consider Mrs. *Ryers* as entitled to that part of the *Corson* estate which she possessed before her marriage with *Ryers*,

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2. That by the practice, as it existed at the time the statute relative to judgments and executions was passed, an execution might be issued as soon as it was signed, and before it was entered, or, in other words, before the *roll* was actually filed. The seventh section of that statute declares, (1 N. R. L. 500. sess. 36. ch. 50.) (a) that where any debt shall be recovered, &c. it shall be lawful for the party in whose favor such judgment shall be given, to have an execution against the body, or the goods and chattels, lands and tenements, &c. By the second section of the same act, the judge or officer signing any judgment, is required to set down the day and year of his signing upon the margin of the roll or record where the same judgment shall be entered; and the clerks of the courts are required to mark on the back of every roll or judgment filed, the time of filing the same; and no judgment shall affect any lands, &c., but from the time of the actual filing of the roll or record of the judgments in their respective offices, after the same shall have been signed as aforesaid. Now, the judgment is perfect as soon as the judgment-roll is signed by the judge or officer, in the manner prescribed by the act, so as to authorize the issuing of an execution against the *body* of the debtor; though his lands cannot be affected until the judgment is actually filed or docketed. It is expressly laid down in the *English* books of practice, that an execution may issue as soon as judgment is signed. (Tidd's Pr. 909. Gilb. C. P. 24. Law of Executions, 43. Sheridan's Pr. 299. Barnes's notes, 197.) Tidd (Pr. 843.) says, "The taxing of costs upon a *postea*, is considered as signing final judgment, after which execution may be immediately taken out against the defendant's person or goods; but in order to charge him in execution, or bind his lands, &c., or if a writ of error be brought, it is necessary that the judgment should be entered of record, and docketed, and the judgment-roll carried to, and filed in the treasury of the court." (1 Crompton's Pr. 336. 1 Sellon's Pr. 530, 531.) The charging in execution mentioned by Tidd is a very different thing from issuing a *ca. sa.* To charge a defendant in execution, according to the *English* practice, a *committitur* must be entered on the roll; and to authorize the entry of such *committitur*, on record, a *committitur-piece* must be filed with the clerk. (3 Burr. Rep. 1841. 1 Crompt. Pr. 377.)

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*SPENCER, Ch. J. It has been the established and invariable practice of this court, for more than thirty years, to require the judgment-roll to be filed with the clerk, before issuing execution. It is, therefore, unnecessary to take notice of the practice of the *English* courts. The motion to set aside the execution ought to be granted, on the defendant's stipulating not to bring an action for false imprisonment.

Per totam Curiam.

Rule accordingly.

(a) 2 Rev. Stat. 363.

UTICA,
October, 1822.SHUFELT *against* CRAMER and SIMMONS.THE PEOPLE
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HERKIMER.

IN ERROR, on *certiorari* to a justice's court. *Shufelt* was plaintiff below, and proceeded by summons, on the return of which issue was joined. The cause was adjourned until the 14th of *January*, at 2 o'clock, P. M. The defendants appeared according to the adjournment, and were ready to proceed. The justice waited until 10 minutes past 3 o'clock, P. M., and then called the parties; the defendants appeared, but the plaintiff did not appear, whereupon the justice gave judgment of nonsuit, and adjudged to the defendants their costs.

Where, after issue joined in a justice's court, the cause is adjourned to another day, and the justice waits a full hour after the time appointed, for the appearance of the parties, that is a reasonable time, and he may proceed to call them, and give judgment against the party who neglects to appear. (a)

Per Curiam. The justice was bound to wait a reasonable time for the appearance of the parties. No case has yet decided what shall be considered a reasonable time. We think, however, that waiting a full hour after the time appointed, is giving a sufficient and reasonable time for the appearance of either party. This is in conformity to the practice on a summons to show cause before a judge. We are of opinion, that, as a general rule, the justice must wait an hour for the appearance of the parties, and that he need wait no longer, unless some excuse, which he shall deem reasonable, be shown, for giving further indulgence. In the *present case, there was no excuse for not appearing at the end of the hour after the time appointed.

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Judgment affirmed.

(a) Vid. *In the Matter of Pulver*, 6 *Wendell's Rep.* 632. *Gould v. Bissell*, 1 *Ibid.* 210. *Lawther v. Crumme*, 8 *Cow. Rep.* 87.

THE PEOPLE *against* THE JUSTICES OF THE GENERAL
SESSIONS OF THE PEACE OF HERKIMER COUNTY.

A WRIT of *mandamus* was issued, at the last term, directed to the justices of the General Sessions of the Peace of *Herkimer* county, commanding them to render judgment on the verdict found on the trial of *James Boyle*, in that court, on an indictment for perjury, or show cause, &c. From the return to the *mandamus*, it appeared, that *B.* pleaded not guilty, and was tried in *December* last, and the jury found a verdict of guilty; on which judgment was suspended by the court until *May*, when his counsel moved in arrest of judgment, on the ground that no writ of *venire facias* has been issued to the sheriff of *Herkimer* to summon a jury to try the issue of traverse on the indictment. It appeared, that a precept, under the seal of the court, tested the 30th of

A general warrant or *venire*, under the seal of the court, to the sheriff, to summon grand and petit jurors, for the trial of all the causes which are to be tried, before a court of general sessions of the peace, returned with the panels of jurors annexed, in the manner directed by the 11th sec-

tion of the act of *February*, 1813, (1 *N. R. L.* 325. sess. 36. ch. 4.) (b) is sufficient; and there need not be a *venire* in each particular cause.

Where such *venire* is tested out of term, the Court of Sessions may amend it, it being a mere clerical mistake. A person convicted cannot take advantage of such mistake, in arrest of judgment.

(b) 2 *Rev. Stat.* 411.

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November, 1821, was issued to the sheriff, to summon twenty-four good and lawful men, to serve as a grand inquest, &c., and also thirty-six good and lawful men, &c. "to make a jury for the trial of such causes as should then and there be tried, &c." The sheriff returned the writ, with two panels annexed, one containing the names of twenty-four grand jurors, and the other the names of thirty-six petit jurors, certified under the hand of the clerk; and that the jurors had been regularly summoned by him; and their names had been regularly drawn from the jury box kept in the office of the clerk of the Court of C. P. of H. The counsel for the prisoner objected, that the general precept to summon a jury for all issues, was insufficient; and because the certificate of the clerk to the panel, which was dated the 23d of November, 1821, being out of term, was, therefore, irregular and void. The Court of Sessions, on both *grounds, considered the trial irregular, and arrested the judgment: and they stated this to be the cause why they had not proceeded to render judgment on the verdict.

Ford (D. A.) now moved for a peremptory *mandamus*. He said the only question was, whether the trial of *B.* was irregular, because no *venire* was issued to try that particular traverse. The case of *The People v. M'Kay* (18 Johns. Rep. 212.) was decided upon the general ground, that the "act for regulating trials of issues, and for returning able and sufficient jurors," (1 N. R. L. 328. sess. 36. ch. 4.) (a) and the "act concerning circuit courts and sittings, and the courts of oyer and gaol delivery," (1 N. R. L. 335. sess. 36. ch. 66.) must be considered in *pari materia*; and as the latter act declared, in terms, that the district attorney shall issue a warrant under the seal of the Supreme Court, to the sheriff, &c., the trial in that cause was irregular, as no such warrant had been issued. The present case was in the Court of General Sessions of the Peace, and the first act only was to be taken into consideration. He contended, that it had been the long established, and invariable practice of the district attorneys, in the several counties, to issue general warrants to the sheriffs, for summoning jurors for the Courts of Sessions, to try all the causes, instead of issuing a *venire* in each particular cause. He said, that the act (1 N. R. L. 328.) (a) required the clerk "to make out and certify under his hand, a panel of the names of the jurors, so drawn out, with their respective places of abode and additions, and deliver the same to the sheriff, or officer whose duty it shall be to summon the several persons," &c. This certificate is the act of the clerk, and there is nothing in the statute which requires that it should be tested in term, or sealed.

Lynch, contra, said, that at common law, a *venire* was essentially requisite to authorize the sheriff to summon a jury. In the case of *The People v. M'Kay*, it was contended, that the *eleventh* section of the act of the 25th of February, 1813, (1 N. R. L. 325. 328.) (a) dispensed with the necessity of issuing a *venire* in each cause; but the court decided, that a *venire* was requisite. By the

(a) 2 Rev. Stat. 411.

16th section *of the act, (1 N. R. L. 339.) grand and petit jurors are required to be summoned by the sheriff; and the court held, that a *venire* was necessary for that purpose. The sheriff is required, in the same terms, to summon jurors for the General Sessions of the Peace; and of course a *venire* was necessary. As this is not an application by the prisoner himself, he cannot be again tried for the same offence; and if the court should be of opinion, that the Sessions were right in arresting judgment, the defendant, who is now in prison, ought to be discharged.

Again; if the precept set forth in the return is to be considered as a *venire*, it is void, for being tested out of term.

Per Curiam. The *eleventh* section of "the act for regulating trials of issues, and for returning able and sufficient jurors," (1 N. R. L. 325. sess. 36. ch. 4.) (a) supersedes the necessity of a *venire* in each particular cause. In the case of *The People v. M Kay*, which was in the *oyer and terminer*, there was no *venire* at all; for the paper purporting to be a *venire*, not having the seal of the court, was considered a nullity. But the general *venire* in this case was under seal, and was regularly returned with the panels of jurors annexed. And though it may have been tested out of term, it was not, therefore, void; but the Court of Sessions had the power to amend it, by altering the teste to the last day of the preceding court, it being the mere act of the clerk; and the defendant in the court below could not take advantage of such an error or irregularity, in arrest of judgment.

Motion granted.

(a) 2 Rev. Stat. 411.

*JACKSON, *ex dem.* RUSSELL, against WHITE.

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EJECTMENT for lot No. 41, in the north-east quarter of the town of *Columbus*, in the county of *Chenango*, tried before Mr. Justice *Van Ness*, at the *Chenango* circuit, in *June*, 1821.

The plaintiff gave in evidence letters patent, dated *May 27th*, 1791, to *Robert Edmonston*, for the north-east quarter of the seventeenth township on the *Unadilla* river, (now the town of *Columbus*.)

J. Aitcheson, a witness for the plaintiff, testified, that he was well acquainted with the family of *Robert Edmonston*, and that he died in *Great Britain*, about the year 1792, leaving three children,

cr, on his parole, and remained such prisoner, at *Albany*, until *December* or *January* following, waiting for a passport to join his regiment, when he either joined the *British* army, or went to *England*, where he died about the year 1800, being then a general in the *British* army: *Held*, that *W. E.* never became a citizen of this state, after it had thrown off its allegiance to *Great Britain*, and become a sovereign and independent state; but that he continued a *British* subject, so that he could not, by reason of his *alienage*, take lands in this state, by descent, from his brother, who died in 1792.

Although the convention of delegates of this state, on the 9th of *July*, 1776, adopted the declaration of independence, and there were committees, or temporary bodies of men who took charge of the public safety, there was no regular organized government, or any executive, legislative or judicial authority of the state, until the adoption of the constitution, on the 20th of *April*, 1777.

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W. E. came from *England* in 1774, and resided in this state, and was an officer in the *British* army. Having been arrested in 1776, as a person disaffected to the *American* revolution, he was, in *August*, or the beginning of *September*, 1776, a prisoner.

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Samuel B., Elizabeth Frances, (now the wife of *George Riddel*,) and *Andrew*, all of whom were born in *Great Britain*, where they have always resided, except *Andrew*, who came into this state in the year 1811. That *Robert E.*, at the time of his death, left two sisters, *Grace* and *Eleanor*, and one brother, *William*, all of them born in *Great Britain*; and none of them, except *William*, ever resided in this country. That *Grace* died in the life-time of *William*, without issue; *William* died in *London*, about twenty years ago, and was, at the time of his death, a general in the *British* army; that *Eleanor* is still living. The plaintiff then gave in evidence a deed from *Eleanor E., Samuel B. E., George Riddel*, and *Elizabeth Frances*, his wife, and *Andrew E.*, to the lessor of the plaintiff, dated *April 27, 1812*, for lots 39, 40, 41, 42, and 43, as designated on a map made for the said *William Edmonston* in *November, 1796*.

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John Frank, a witness, testified, that he knew *William Edmonston*, who lived on his farm, called *Mount Edmonston*, on the *Unadilla* river, before the revolutionary war; *that, in 1776, the witness was a member of the committee of safety, in the town of *German Flatts*; and the committee, in that year, caused *W. E.*, who was a major in the *British* service, to be arrested, as a disaffected person, and he was sent to *Albany*, where he remained, as the witness was informed, during the ensuing winter; and the witness believed, that he was arrested after the declaration of independence. Another witness testified, that she saw *William E.*, in the fall of the year 1776, at the *German Flatts*; that he came there on his way to *Albany*. That she knew the time, as it was after the birth of her eldest child, who was born the 19th of *August, 1776*. Another witness testified, that he saw *William E.* in *Albany*, the latter end of *August*, or beginning of *September, 1776*, and was informed by him that he had just arrived, and was a prisoner on his parole; that he again saw *W. E.* in *Albany*, in *December* or *January* following, and was told by him, that he was waiting for a passport to join his regiment. This evidence, as to the residence of *W. E.* in this state, was objected to by the defendant's counsel, but the objection was overruled by the judge.

A witness (*Cannon*) for the defendant testified, that he passed through *Albany*, in *May*, or *June, 1776*, on his way to *Lake George*, and heard that Major *Edmonston* was there, and complained of being made a prisoner; but he did not see him; the witness said, that on his way to *Lake George*, he met the *American* troops on their retreat from *Canada*.

The defendant read in evidence an act of the legislature, entitled, "An act for the relief of the children of the late *Robert Edmonston*," passed *March 29th, 1816*; and, also, the decision of the chief justice and surveyor-general, made in pursuance of the act, by which it was decided, that the defendant was an actual settler on lot No. 41, the premises in question, under the said act and that the children of the said *Robert E.* should convey the said lot to the defendant, on the terms mentioned by that decision, from which it further appeared, that *Andrew Edmonston*, in behalf of the

children of *Robert Edmonston*, attended with his counsel, before the chief justice and surveyor-general.

*This evidence was objected to by the plaintiff's counsel but admitted by the judge.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the facts above stated, with liberty to either party to turn the same into a special verdict.

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R. Campbell, for the plaintiff. He contended, 1. That *William Edmonston*, being a freeholder in this state until, and after the 16th of *July*, 1776, owed allegiance to the state, and was a citizen thereof, and had capacity to take and hold lands by descent. On the 16th of *July*, 1776, the convention of the state, whose proceedings are declared by the constitution to be part of the laws of the land, "resolved unanimously, that all persons abiding within the state of *New-York*, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the state." The case of *M Ilvaine v. Cox*, (2 *Cranch's Rep.* 280. 4 *Cranch's Rep.* 209.) which was similar, in almost every respect, to the present case, is decisive on this point. The acts of the government of this state are equally strong as those of *New-Jersey*, in asserting its claim to the allegiance of those persons who were inhabitants of the state. They are all in perfect accordance with the ordinance of the 16th of *July* (a) For instance, the declaration or ordinance introduced by *Mr. Jay*, *May* 10, 1777, and passed unanimously, offered a "free pardon to such of the subjects of this state as, having committed treasonable acts against the same, shall return to their allegiance;" and *that ordinance recites, that "divers subjects of this state have been seduced from their allegiance to the same, by the acts of subtle and wicked emissaries from the enemy;" and offers them, on their taking the oath of allegiance, a full and free pardon; and that they be *restored* to a participation of all the rights and privileges appertaining to the good people of this state.

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2. The descent from *William Edmonston*, being after the treaty of 1794, between the *United States* and *Great Britain*, is within the provisions of the *ninth* article of that treaty, and protected by it. It may, perhaps, be objected, that *William Edmonston* could not be an *American* citizen in 1792, and a *British* subject in 1794, and at his death. But there is nothing repugnant or inconsistent in his being both. He was born in *Great Britain*, and after he left this state, he resided in his native country. According to the *English* laws, he owed perpetual allegiance to that country, as a natural born subject; and if the laws of this country imposed on

(a) A copy of this ordinance, handed to the court by the counsel, was as follows: "Resolved, unanimously, that all persons abiding within the state of *New-York*, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of this state; and that all persons passing through, visiting, or making a temporary stay in the said state, being entitled to the protection of the laws, during the time of such passage, visitation, or temporary stay, owe, during the same time, allegiance thereto.

* That all persons members of, or owing allegiance to this state, as before described, who shall war against the said state, within the same, or be adherent to the king of *Great Britain*, or others, the enemies of the said state, within the same, giving him or them aid and comfort, are guilty of treason against the state; and being thereof convicted, shall suffer the pains and penalties of death."

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him a new allegiance, it did not destroy his natural allegiance, while he remained in the *British* dominions, nor prevent his being a *British* subject. If he had the right, before the treaty, which other *British* subjects had not, that cannot take away his right, acquired in common with other *British* subjects, under the treaty. The treaty is a compact between the two nations, and is to be construed according to the understanding of the contracting parties. There can be no doubt, that *William Edmonston* was considered by the *British* government, in 1794, as a *British* subject, for whom provision was made in that treaty. If so, he must be deemed by this court a *British* subject, for the purposes contemplated by the contracting parties to the treaty. The decisions of the *English* courts are in accordance with this doctrine. In *Marryat v. Wilson*, (1 *Bos. and Pull.* 430.) the Court of Exchequer Chamber decided, that a natural born *British* subject, who had become a naturalized citizen of this country, either before or after the declaration of independence, was to be considered as an *American* citizen; so as to entitle him to the benefits of the provisions of the treaty of 1794, in regard to the trade with the *East Indies*.

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**H. Van Der Lyn*, contra, contended, 1. That the premises in question, on the death of *Robert E.*, in 1792, escheated to the state, on account of the alienage of his children. (*Calvin's case*, 7 *Co.* 25. a. *Jackson v. Lunn*, 3 *Johns. Cases*, 109. 120.) There is a distinction, in this respect, between a purchase, and a taking by descent. In case of a purchase, the alien holds until office found: but where an alien dies seised of land, the law, *quæ nihil frustra*, will not give the land to an alien heir, who cannot keep it. (1 *Ventris*, 417. 1 *Bos. and Pull.* 48. *Fairfax v. Hunter's Lessee*, 7 *Cranch*, 603. 621. 7 *Term Rep.* 98.)

2. Admitting *William E.* to have been *antenatus*, or born under a common allegiance, before the *American* revolution, yet it has been settled that a *British* subject, born before, cannot, since the revolution, take lands by descent in this country. (*Fairfax v. Hunter's Lessee*, 7 *Cranch*, 603. 620. *Kelly v. Harrison*, 2 *Johns. Cases*, 29. *Dawson v. Godfrey*, 4 *Cranch*, 321.)

3. *William E.* cannot be considered as a citizen of this state, in consequence of his being here after the declaration of independence. From the evidence of the witness, *Cannon*, it is most probable, that he was arrested in *May*, 1776; but admitting that his arrest was after the 9th of *July*, yet, being a natural born subject of *Great Britain*, he had a right, at the commencement of the revolution, to dissent from it, and the declaration of independence, and to adhere to his allegiance to the king of *Great Britain*; and the evidence shows, that he exercised that right, and, therefore, never became a citizen of this state. In *Chapman's case*, decided in the Supreme Court of *Pennsylvania*, in 1781, (1 *Dallas*, 53.) Chief Justice *M'Kean*, fully recognizes this right of the minority, in case of a revolution or change of government. So, in 1795, in the case of *Caignet v. Pettit*, (2 *Dallas*, 234.) the same court, in the case of a *Frenchman*, admit, that he had an undoubted right to dissent from the revolution, and, as a member of the minority, to

refuse his allegiance to the new government, and withdraw from the territory of *France*. The only question is, whether *W. E.* did dissent from the revolution, within a reasonable time, and quit the country. It appears, that as early as *August*, *1776, he was arrested as a dangerous and disaffected person, holding a commission in the *British* army, and was detained, as a prisoner on his parole, until *December* following, when he was either exchanged as a prisoner of war, or permitted to return to *England*.

4. At the time of *W. E.*'s arrest in 1776, the colony of *New-York* had no government, no executive or legislature, duly constituted by the people; for the constitution of this state was not adopted until *April*, 1777. He, therefore, could not be a subject of the colony. Where there is no government, there can be no allegiance. Every thing, at that time, was in disorder and confusion. The people were *in transitu* from the condition of a colony, to that of an independent state: and, during that period, *New-York* retained the name of a colony. The declaration of independence worked a dissolution of government; the acts of assembly, and the common and statute law of *England*, were no longer in force, and were not revived, until the constitution of the state was adopted. No laws, passed subsequent to the arrest and departure of *W. E.* from the state, could have any operation as to him.

5. Laws of the state, passed as late as 1778 and 1781, recognize the right of the *loyalists* to refuse to become citizens of the state. (1 *Greenl. Ed. Laws*, 22. 43. Sess. 1. ch. 47. Sess. 4. ch. 33.) If, then, *W. E.* had continued in the state, as late as 1781, he would have had the right of electing to continue a subject of the king of *Great Britain*, and of being sent home as a prisoner of war.

6. But admitting even that *W. E.* was an *American*, at the time of his departure to *England*, we contend, that the premises in question, on his death, in 1801, escheated to the state, and did not descend to his sister and the children of his brother *Robert*, by reason of their alienage. In answer to this objection, the plaintiff relies on the 9th article of the treaty of 1794, between *Great Britain* and the *United States*. But that treaty was intended to secure *British* subjects, holding lands in the *United States*, from the consequences of *alienage*, and to enable them to sell, grant and devise the same, as if they were native *American* citizens. *American* citizens did not require the protection of an article *of the treaty, to remove the obstacle of alienage, which, as to them, did not exist, and invest them with the rights of native citizens, which they already possessed. If, therefore, *W. E.* acquired a title to the premises in question, by descent, on the death of his brother *Robert*, in 1792, and the treaty of 1794 had never been made, he would have continued to hold the lands, as a native citizen, until his death. The 9th article of the treaty has, then, no application to the case of *American* citizens. And, if *W. E.* did, in truth, hold the premises in question, at the date of the treaty of 1794, as a native *American* citizen, according to the laws of this state, he could not, at the same time, have held them as an alien, and subject of *Great Britain*. While a person in the *United States* is

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regarded as a citizen, he never can cease to be so regarded, until he has expatriated himself, and become the subject of another government. (*Fish v. Stoughton*, 2 Johns. Cases, 407.)

Again, the dissolution of the *British* government in *America*, and the erection of a new and independent government, absolved all the citizens of the new government from their allegiance to *Great Britain*; and by the treaty of peace of 1783, *Great Britain* recognized the independence of the *United States*, and of all its citizens, among whom *W. E.* would be, of course, included. (3 *Dallas*, 224. 1 *Bac. Abr.* 129. 1 *Woodes*. 382.) If *W. E.*, therefore, be considered as a citizen of *New-York*, he was absolved by the *British* government from his natural allegiance to that government, and could not, without some act of denization or naturalization, become again a subject of *Great Britain*.

The treaty of 1794 does not determine who were *British* subjects or *American* citizens, but leaves that question to be determined by the laws of the respective governments. (4 *Cranch*, 214.) It would be strange that a native *American* citizen should be considered, in an *American* court, as holding lands in the *United States*, not as a citizen of his own country, but as a subject of *Great Britain*: for he must be considered as holding the land as a *British* subject, before the 9th article of the treaty can be made applicable to his case. Those *British* subjects who held lands in the *United States*, as *aliens*, were, by the 9th article of the treaty, to be *considered as native citizens, so far only as respected those lands, and the legal remedies incident thereto; but in all other respects, they continued *aliens*. If *W. E.*, at the date of the treaty, was an *American* citizen, he must, notwithstanding that treaty, be considered as holding his lands as an *American* citizen. (*Jackson, ex dem. Folliard and another, v. Wright*, 4 Johns. Rep. 75. 79.)

The case of *Marryat v. Wilson* (1 Bos. & Pull. 442. S. C. 8 Term Rep. 31.) has been cited by the plaintiff's counsel, to show that a natural born *British* subject, who has become an *American* citizen, is considered in *England*, in regard to their navigation laws, as an *American* citizen. That case, however, supports the position for which we contend, that an expatriated subject, who has become the subject of another state, is to be, thereafter, regarded in his native state as the subject of his adopted country. *England*, notwithstanding her feudal maxim, *nemo patriam in qua natus est exuere, nec legentiae debitum ejurare, possit*, is in the habit of violating that maxim, and of adopting the natural born subjects of other countries. Chief Justice *Eyre* might well put into the mouth of the *Englishman*, to say, "I violated no law of my parent state, in procuring myself to be received a subject in the *United States*. She encourages the practice, for she herself adopts the subjects of other states. Why then are the fruits of my adoption to be withheld from me?" Besides, it has been shown, that the independence of the *United States* absolved all its citizens from their former allegiance as natural born subjects of *Great Britain*; and consequently, *W. E.*, if he became a citizen of this state, by the declaration of independence, could not thereafter be consid-

ered a subject of *Great Britain*, by reason of his birth in *England*. It was, therefore, out of the power of *Great Britain*, at the date of the treaty of 1794, to claim *W. E.* as a subject, after having ratified and confirmed, by the treaty of 1783, the independence of the *United States*. Chief Justice *Eyre*, in *Marryat v. Wilson*, says, "By the way, I do not understand upon what ground the case of *Butler* was distinguished from *Collet's* case, unless it be that *Butler* has been expressly discharged from his allegiance by act of parliament, in consequence of our acknowledging *the independence of the *United States*." The facts were, that *Butler* was domiciled in the *United States* before, and *Collet* after the declaration of independence. Most clearly, the *United States* could not, without surrendering their sovereignty and independence, permit any person who became a citizen, at the declaration of independence, to be afterwards claimed by *Great Britain* as a subject, on the ground of his having once owed a natural allegiance to that country.

We contend, therefore, that, whether *W. E.* was or was not an *American* citizen, the plaintiff is not entitled to recover.

SPENCER, Ch. J. I consider these facts as proved: that *William Edmonston* came from *England* to this state in 1774, at which time he was a major in the *British* service. In 1776, he was arrested by direction of the committee of safety, in the town of *German Flatts*, as a person disaffected to the revolution. In the latter part of *August*, or beginning of *September*, 1776, he was in *Albany*, in consequence of this arrest. He was there as a prisoner on his parole, and remained there until the following winter, waiting for a passport to join his regiment. After that time, we have no further account of him during the revolutionary war; but the inevitable presumption is, that he joined the *British* forces, or proceeded immediately to *England*; for there is no proof that he continued to reside in this state, or in any part of the *United States*; and the evidence is, that he died a general in the *British* army.

The lessor of the plaintiff does not claim to have derived title under the children of *Robert Edmonston*, as his heirs, but claims that *William Edmonston* was a citizen of this state, and took, by descent, the real estate of his brother *Robert*, as his heir; and that, on the death of *William*, it descended to his sister *Eleanor*, and to his nephews and niece, the children of *Robert*. It becomes, then, unnecessary to consider the effect of the act of the 29th of *March*, 1816, and the decision of the chief justice and surveyor-general under it.

It is not pretended that the children of *Robert Edmonston* *could take the lands whereof he died seised, by descent, and as his heirs. They were aliens, and he died in 1792; so that the 9th article of the treaty between the *United States* and *Great Britain*, of 1794, does not apply to their case. The question, then, which I propose to examine, is, whether *William Edmonston* became a citizen of this state, after it had thrown off its allegiance to *Great Britain*, and became a distinct and independent sovereignty

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We are called upon to discuss and decide this question, as a mere matter of private right, when all the feelings and passions incident to so mighty a revolution have subsided. I think it cannot be doubted, that when a people, from a sense of the viciousness of a government under which they have lived, are driven to the necessity of redressing themselves, by throwing off the allegiance which they owed to that government, and, in its stead, erecting a new and independent one of their own, that such of the members of the old government only, will become members of the new, as choose voluntarily to submit to it. Every member of the old government must have the right to decide for himself, whether he will continue with a society which has so fundamentally changed its condition. For, having been incorporated with a society under a form of government which was approved, no one can be required to adhere to that society, when it has materially and radically changed its constitution. Every member submitted to the society as it was, and owed obedience to it, while it remained the same political society. When it divests itself of that quality, by an entire new institution of government, it cuts the knot which united its members, and discharges them from their former obligations. (*Vattel*, b. 1. ch. 3. s. 33. and ch. 16. s. 195. *Puffendorf*, 639.) These principles were expounded by Ch. J. *McKean*, in a very satisfactory manner, in *Chapman's* case. (1 *Dallas's Rep.* 58.) He observed, that in civil wars every man chooses his party; but that all the writers agree, that the minority have individually an unrestrainable right to remove with their property into another country; that a reasonable time for that purpose ought to be allowed; and, in short, that none are subjects of the adopted government, but those who have freely assented *to it. The cases mentioned by the writers on the laws of nature and nations, are not precisely analogous with the condition of the *American* provinces, at the commencement of our revolutionary contest. Ours was a civil war; in the event of failure, it would have been regarded as a rebellion; it terminated prosperously and gloriously, and became a revolution. But, that there was an entire dissolution of the government, under which we lived as provinces, owing allegiance to the *British* crown; and that a new form of government, and a new organization of the political society took place, cannot be denied; and hence the case occurred in which every member of the old society had a right to determine upon adhering to his old allegiance, and withdraw himself; or to abide among us, and thus tacitly, or expressly, yielding his assent to the change, and becoming a member of the new society.

It is to be observed, that, although the declaration of independence was made by congress, on the 4th of *July*, 1776, and although the convention of delegates of this state adopted that declaration on the 9th of the same month, and although we had committees, and temporary bodies of men, who took charge of the public safety, we had no executive, legislative or judicial authority, nor any organized government, until the 20th of *April*, 1777. It would be a very grave question, which I shall avoid discussing

whether, until the adoption of our constitution, treason could be committed against that imperfect and inchoate government which was called into existence by the necessity of the case, and was continued until the people could deliberate and settle down upon a plan of government calculated to secure and perpetuate their liberties. But the question is, whether Major *Edmonston*, being in this state at the very commencement of that revolutionary struggle, holding a commission in the army of the *British* king, and being taken up, within one or two months after the declaration of independence, put on his parole, and finally sent out of the country as a dangerous and disaffected man, prior to the institution of any regular form of government, can be said to have renounced the former government, and to have become a member *of the new society, and ever afterwards to have retained the rights, duties and privileges of an *American* citizen.

I cannot bring my mind to doubt on this question; and to me it appears most clearly, that Major *Edmonston* never did acquire the character of a citizen of this state. In *Chapman's* case, Ch. J. *M'Kean* said, that when the word *subject*, instead of *inhabitant*, is used, it meant a subjection to some sovereign power; it refers to one who owes obedience to the laws, and is entitled to partake of the elections into public office; and he observed, that if there were no laws to be obeyed, the prisoner could not be deemed a subject of the state of *Pennsylvania*. It has been decided by the Supreme Court of the *United States*, (4 *Cranch's Rep.* 321.) that a subject of *Great Britain*, born before the declaration of independence, who was never in the *United States*, cannot take lands in this country by descent from a citizen. In *Kelly v. Harrison*, (2 *Johns. Cases*, 30.) it was decided, that although the division of an empire worked no forfeiture of a right previously acquired, and, as a consequence, all the citizens of the *United States* who were born prior to our independence, and under the allegiance of the king of *Great Britain*, would still be entitled there to the rights of *British* subjects; yet the rule would not apply *e converso*, and *British* subjects have not, with us, the privileges of citizens; and for this reason, that the sovereignty of the *United States* was created by the act of independence, and there could be no previous right acquired in respect to it, and, consequently, none to lose; nor could it include any other than residents, at the time, within the jurisdiction of the state; and that, therefore, the demandant, who was the widow of *Kelly*, prosecuting for her dower in lands acquired by her husband after the declaration of independence, who had been married to *Kelly* before the revolution, but who remained in *Ireland* during and after it, he having resided here, and become a citizen, was held not to be endowable of such after-acquired lands. This decision fully sanctions the principle, that there must, even in the case of a *feme covert*, be some personal act, indicative of an assent to become a member of the new government, and without it, the rights of citizenship are not acquired. Residence *here, after the organization of the government, would generally authorize the presumption of assent; for it would be evidence of a union with the new society. When,

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however, we find a person holding a military office under the regal government, arrested by those who were zealously engaged in effecting a division of the empire, and in rearing a new government, for his disaffection to that new government, so soon after the declaration of independence; and when we find him a prisoner for that cause, and immediately thereafter departing out of the jurisdiction of the new government, and, in all human probability, taking part, and bearing arms against its independence; and, finally, when we consider, that his arrest and departure took place before the institution of a regular government in any of its departments, it appears manifest to me, that he cannot be considered as having thrown off his allegiance to the former government, and that, consequently, he never became a member of the new government, but remained a *British* subject.

The plaintiff's counsel has referred us to an ordinance of the convention of this state, of the 16th of *July*, 1776, which, he supposes, recognizes persons in the situation of Major *Edmonston*, as citizens. It resolves, "that all persons, *abiding* within the state of *New-York*, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the state; and that all persons passing through, visiting, or *making a temporary stay* in the said state, being entitled to the protection of the laws, during the time of such passage, visitation, or *temporary stay*, owe, during the same time, allegiance thereto; and that all persons, members of, or owing allegiance to this state, as before described, who shall levy war against the said state, within the same, or be adherent to the king of *Great Britain*, or others, the enemies of said state, giving to him or them aid and comfort, are guilty of treason against the state; and, being thereof convicted, shall suffer the pains and penalties of death."

This ordinance takes the distinction between such persons as were abiding within the state, and, as such, deriving protection from, and owing allegiance to the laws, and thereby *becoming members of the state; and such as were passing through, visiting, or making a temporary stay within the state. The former class, those who were abiding here, were considered by the convention as citizens; but the latter class were considered as owing a mere temporary allegiance, which terminated with their departure from the state. The resolution distinctly admits, that such persons as were making a *temporary stay*, who did not mean to abide here, but to leave the country as soon as they could, were not members of the new community. This ordinance, then, so far from regarding persons in the situation in which we find Major *Edmonston*, as members of the new government, in my judgment, considers them not to be such members. It will be recollected, as a known historical fact, that, in the early part of the contest, the several provinces assumed arms, merely for the redress of grievances, and that there was no idea of erecting independent governments, and throwing off all allegiance to the *British* government, until the period of the declaration of independence by congress. Residence in this state, prior to that event, imported

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adhering, as regards the election or determination of such residents, to adhere to the old, or to adopt the new government. The *temporary stay*, mentioned in the resolution of the convention, passed only twelve days after the declaration of independence by congress, and within five days after the adoption of the declaration by the convention of this state, clearly imports, that such persons who were resident here without any intention of permanent residence, were not to be regarded as members of the state; and such was the precise character and situation of Major *Edmonston's* residence. The case of *M'Irvine v. Coxe's Lessee* (4 Cranch, 209.) has been relied upon, as a strong and decisive authority for the plaintiff. The facts of that case are stated in 2 Cranch, 289. The opinion delivered by Mr. Justice *Cushing* contains no principle at variance with the conclusion to which I have come in this case. It proceeds entirely on the ground, that *Daniel Coxe* remained in *New-Jersey*, not only after she had declared herself a sovereign state, but after laws had been passed, by which he was pronounced to be a member of, and in allegiance to the new government. The *right which *Coxe* had to elect to abandon the *American* cause, and to adhere to his allegiance to the king of *Great Britain*, I understand not to have been doubted by Judge *Cushing*; and he places the decision not only on the continued residence of *Coxe* in *New-Jersey*, until in 1777, but on the legislative acts of that state, at several periods, recognizing him as a citizen of the state. That case, being essentially different from this, in the important facts of the case, can have no influence in the decision.

The plaintiff's counsel relied, also, on another ordinance or resolution of the convention of this state, of the 10th of *May*, 1777, offering "a free pardon to such of the subjects of the state as, having committed treasonable acts against the same, shall return to their allegiance." This ordinance leaves the inquiry, who were subjects of the state, open to examination; and I have endeavored to show, that Major *Edmonston* was not a subject of the state. Besides, this resolution was posterior to the adoption and promulgation of the state constitution; and treasons may have been committed in the interval between the adoption of the constitution and this ordinance. There may, also, have been persons who had, openly and unequivocally, made their election to become members of the new government, and who were afterwards guilty of treasonable acts. When the convention speak of *subjects of the state*, they speak of those who owed a permanent allegiance to the state as a political body, and had acquired the rights and owed the duties of citizenship; for we perceive, that the same convention had, on the 16th of *July*, 1776, discriminated, with great accuracy, between an abiding in the state, which produced permanent allegiance, and a temporary stay, which exacted obedience only during such stay.

Having come to the conclusion, that *William Edmonston* never became a citizen of this state, he was incapable, from his alienage, of taking by descent from his brother. This disposes of the

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cause, and renders it unnecessary to consider the other points raised by the defendant's counsel.

PLATT, J., concurred.

WOODWORTH J., dissented.

Judgment for the defendant.

[* 328] *BRANDEGEE against THE NATIONAL INSURANCE COMPANY. (a)

In an action on a policy of insurance, containing a clause, "that if the vessel, upon a regular survey, should be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, the assurers should not be bound to pay their subscription," the declaration stated, that "by storms, winds, tempestuous weather, and by the perils and dangers of the seas, the vessel became leaky, and was greatly broken and

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asmuch as she could not receive her necessary repairs there, nor safely proceed to sea to procure repairs elsewhere, she was condemned and sold, &c., whereby she became totally lost to the plaintiff," &c.

The defendants pleaded in bar, admitting the arrival of the vessel at St. John's, as stated in the declaration, and that a survey was made, &c. But setting it forth more fully, by which it was found, "that a great part of her timbers and planks, from the stern-post to the stem of the ship, on both sides, were entirely rotten," &c.: Held, that as the plea admitted the cause of action as stated in the declaration, and set up new matter in avoidance of the action, which the plaintiff was not bound to prove, and which involved a question of law, on which the defendant was entitled to the judgment of the court, the plea was good on demurrer.

It is sufficient, in such a case, if the survey state particular facts, from which the conclusion of rottenness and unsoundness is drawn, and for that cause alone, she is declared unseaworthy, or incapable of proceeding to sea. It is not necessary that the survey should follow the exact terms of the clause in the policy. (b)

THIS was an action on a policy of insurance, dated October 28, 1818, on the ship *Montgomery*, "from New-York to St. Eustatia, with liberty to touch and trade at St. Eustatia, on the outward passage, and at and from St. John's, with liberty to touch at St. Croix, for freight, to a port of discharge in the United States." The declaration contained three counts on the policy, and the general money counts, &c. The first count set forth the policy of insurance, which contained the following clause: "And it is further agreed, that if the said vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be bound to pay their subscription on the said policy." The plaintiff in this count averred, among other things, that "while the said ship was sailing and proceeding on her said voyage to St. Eustatia, and the island of St. John's, and before reaching either of the said islands, &c., by stormy winds and tempestuous weather, and by the perils and dangers of the seas, she became and was leaky, and greatly broken and damaged, and upon her arrival at the island of St. John's, and a survey duly had upon her, she was found injured in her planks and timbers; and inasmuch as she could not receive her necessary repairs at the said island of St. John's, and could not safely proceed to sea, to procure *such repairs elsewhere, she was, by legal authority there, for the reasons last mentioned, condemned, and was thereupon sold at public auction," &c.

The second count, after stating the policy, &c., as in the first count, averred, that the vessel, on her voyage out, "encountered stormy winds and tempestuous weather, by reason whereof, and

(a) This cause was decided in May term last.

by the mere perils and dangers of the sea, was injured in her timbers and planks, and sprung a leak, and upon her arrival in the island of *St. John's*, she was overhauled, in order to ascertain the extent of the said leak, upon which occasion some of her timbers and planks were found to be decayed, and upon a due and legal survey, it was deemed and so decided, by the persons legally appointed to make said survey, that the reparation of the said ship could not be done at *St. John's*; and it was likewise deemed and so decided, by the same persons, that the said ship was not able to proceed to sea in her then present state; and thereupon the said ship, her tackle, apparel and furniture, were sold and disposed of at public auction; and became, and were wholly lost to the plaintiff."

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The defendants pleaded six pleas: 1. *Non-assumpsit*. 2. As to the *first, second and third* counts, because a regular survey was had upon the ship, at *St. John's*, upon which survey she was declared incapable of prosecuting her voyage, on account of her being rotten, &c., with a verification. 3. As to the first count, that though, upon the arrival of the vessel at *St. John's*, a survey was duly made upon her, by which she was found injured in her planks and timbers, &c., yet, that in and by the said survey, it was further found and declared, that the said vessel was incapable of prosecuting her voyage on account of her being rotten, that is to say, incapable, on account of her being rotten, of the further prosecution of the voyage insured, &c. 4. A like plea to the second count. 5. To the first count, because the defendants say, "That, though true it is, that on the arrival of the said vessel at the island of *St. John's*, as in the first count of the declaration mentioned, a survey was duly had upon her, by which she was found injured in her planks and timbers, &c., yet it was further found and declared, in and by the said survey, that a great part of the timbers and planks, from the stern *post to the stem of the ship, on both sides, were entirely rotten, and that the reparation of the ship could not be done there, and that the ship was not able, in her then present state, to go to sea, &c. 6. The *sixth* plea, which was to the second count, was, in all respects, like the fifth plea.

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Issue was joined on the first plea, and the plaintiff tendered issues, in which the defendants joined, to the second, third and fourth pleas. To the *fifth* and *sixth* pleas the plaintiff demurred: and the defendants joined in demurrer.

*Antho*n, in support of the demurrer, contended, 1. That the pleas demurred to were bad in form and in substance; in form, because they amounted to the general issue. (5 *Comyn's Dig.* tit. *Pleader*, E. 14. 1 *Salk.* 394. *Hob.* 127. *Cro. Eliz.* 871. *Skinner*, 362. pl. 5. 3 *Cro.* 157. 2 *Mod.* 274.) *Marshall* (on *Insurance*, 694, 595.) says, that *non-assumpsit* is the most usual and proper plea to an action on a policy of insurance, as it not only puts in issue every fact alleged in the declaration, but enables the defendant to give in evidence any matter which goes to disaffirm the contract, or to discharge the plaintiff's demand under it, as that the ship was not seaworthy, &c.

2. The pleas are bad in substance. The clause in the policy,

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to which they relate, does not make the *survey* conclusive evidence as to the fact of the vessel being rotten ; and if it is not conclusive, but merely *prima facie* evidence, it cannot be pleaded in bar. (*Haff v. Marine Insurance Company*, 8 Johns. Rep. 163. 167.) In *Garriguez v. Coxe*, (1 Binney's Rep. 592.) the Supreme Court of Pennsylvania held, that such a clause in a policy did not make a *survey* conclusive, so as to be a bar ; but the defendant was bound to prove that the *unsoundness* arose from *decay*, not from *accident*. In *Watson v. The Insurance Company of N. A.*, decided in the Circuit Court of the United States, in April, 1808, (*Condy's Ed. Marshall on Insurance*, 159. b. note.) there was the same clause in the policy, and the court decided, that the report of the surveyors was not evidence of the facts contained in it, but only that a survey had taken place. In the case of the *Marine Insurance Company of Alexandria v. Wilson*, (3 Cranch, 187.) the question as to the conclusiveness of the survey was not decided.

Wells, contra, insisted, 1. That the plea was good in point of form. *Chitty* (*Chitty's Pl.* 497, 498.) lays down the rule on this subject, and which is supported by the authorities cited by him. "Any ground of defence which admits the facts alleged in the declaration, but avoids the action by matter which the plaintiff would not be bound to prove, or dispute, in the first instance, on the general issue, may be pleaded specially." Now, the plea, in this case, admits what is stated in the declaration, and alleges new matter by way of avoidance, to wit, the survey. It is true, that it might be given in evidence under the general issue, but there are many such matters which may be pleaded specially. The clause relative to the survey was introduced into the policy for the very purpose of putting an end to the question as to the seaworthiness of the vessel ; and the survey is made conclusive as to the fact of rottenness, and unsoundness of the vessel, and of her incapacity, for that cause, of prosecuting the voyage.

2. Then, does the survey in this case amount to a bar of the suit? We admit that the survey must be regular, and must declare the vessel to be unseaworthy, because of rottenness and unsoundness, and *solely* on that ground. In *Garriguez v. Coxe*, the unseaworthiness of the vessel was owing to a *mixed* cause. So in *Haff v. Marine Insurance Company*, the cause of the loss was of a mixed nature, and not ascribable to rottenness alone. We contend, that if the survey is made in conformity to this clause in the policy, and declares the unseaworthiness of the vessel, and her incapacity to prosecute the voyage, to be solely owing to her rottenness and unsoundness, it is conclusive, and forms a complete bar to the action. The clause was introduced for the benefit of the insurer, to guard against the consequences of the doctrine laid down in the case of *Depeyster v. The Columbian Insurance Company*, (2 Caines's Rep. 85.) and to prevent his being liable to pay for a vessel not seaworthy when she commenced her voyage. Now, the survey, in this case, fully comes within the terms of the clause. The cause of the unseaworthiness of the vessel, and of her incapacity to proceed to sea, is declared to be rottenness, and decay

of her timbers and planks. No violent storms and tempests were encountered. The vessel merely sprung a leak. In the case of *Steinmetz v. The United States Insurance Company*, (2 *Sergeant & Rawle's Rep.* 293.) the survey stated, that "her stem, apron, bends, and most part of her timbers, are decayed, as also a considerable part of her planks, from which circumstances, in our opinion, to make her a good, stanch and seaworthy vessel, would cost a great deal more than she would be worth when finished;" and the court held it to be conclusive, and a bar to the action. They were of opinion, that it was not necessary that the surveyors should exactly conform to the exact words in the policy; but it is sufficient if the survey states the facts and circumstances as to the *decay* and rottenness, from which the general conclusion is drawn of such unsoundness and rottenness as renders the vessel unseaworthy. This case is perfectly analogous, and in point.

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Anthon, in reply, said, that the plea in this case did not admit the cause of action as stated in the declaration. That, as to the substance of the plea, it was agreed, that if the cause of the incapacity of the vessel to proceed on her voyage was mixed, the survey was not a bar. Now, the first and second counts state, that the vessel was injured by storms and tempests, and that repairs could not be made at *St. John's*. If these allegations are admitted by the plea, then the cause of the vessel's unseaworthiness is not rottenness alone, but of a mixed nature.

SPENCER, Ch. J., delivered the opinion of the court. The principal special cause of demurrer is, that the 5th and 6th pleas amount to the general issue. It is also objected to them, that they are bad in substance, in not admitting the averments in the declaration. In the case of the *Bank of Auburn v. Weed*, (19 *Johns. Rep.* 300.) we thus laid down the rule: any matter of defence which denies what the plaintiff, on the general issue, would be bound to prove, *may* and *ought* to be given in evidence under the general issue, and a plea denying such facts, is bad on special demurrer; *but any ground of defence which admits the facts alleged in the declaration, and avoids the action, by matter which the plaintiff would not be bound to prove or dispute, in the first instance, may be specially pleaded. The case of *Hussey v. Jacob* (1 *Lord Raym.* 87.) was referred to in the case cited. That case was thus: An action of *assumpsit* was brought against the acceptor of a bill of exchange. The defendant pleaded in bar the statute of gaming, (16 Ch. II. ch. 7.) by which the bill was rendered void. One of the objections was, that the defendant ought to have pleaded the general issue, and given the matter pleaded in evidence, the statute having avoided the contract. The court decided, that where the defendant has special matter, consisting only of bare matter of fact, but intermixed with matter of law, which will avoid the charge or action of the plaintiff, he is not obliged to plead the general issue, but may plead it specially, for otherwise he would be obliged to commit a point of law to the jury, who are ignorant of it, which, the court say, would be absurd. The principle laid down in the

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case cited is, in my judgment, a sound one, with this qualification annexed to it, that such matter of defence must admit the facts alleged in the declaration, and avoid them by matter which the plaintiff would not be bound to prove in the first instance, provided the general issue only had been pleaded. (1 *Chitty's Pl* 497. 1 *Tidd's Pr.* 599, 600.)

The first and second counts of this declaration set forth a good cause of action; a loss of voyage by the perils insured against; and the plaintiff was bound, in the first instance, to prove no more, to maintain his action, than the facts he had alleged. He did not set forth facts which show that the ship was unseaworthy, by reason of her being unsound or rotten; nor any incapacity in the ship to prosecute her voyage, on account of her being unsound or rotten. On the contrary, it would seem, that her innavigability proceeded from injuries sustained by stormy winds, tempestuous weather, and the perils of the sea, whereby she became leaky, greatly broken, and damaged; and that she could not receive her necessary repairs at *St. John's*, and could not proceed safely to sea, to procure repairs elsewhere; and, therefore, she was condemned and sold. The pleas *admit the cause of loss stated in the declaration, but set up new matter, which the plaintiff could not have been required to prove; and this new matter involves a question of law, on which the defendant has a right to the judgment of the court, according to the sound doctrine in *Hussey v. Jacobs*.

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If the survey, admitted in part, in the first and second counts, but more fully set forth in the pleas, amounts to a declaration by the surveyors, that the ship was unseaworthy by reason of her being unsound or rotten, and that she was incapable of prosecuting the voyage from that cause, it is decisive upon the rights of the parties. They have seen fit to stipulate, "that if the said vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers should not be bound to pay their subscriptions on the policy." They have made the survey, however the facts may be, conclusive between them; and this being their contract, they are bound by it, and no court has a right to alter it. (1 *Condy's Marsh. on Ins.* 159. b. in the notes.) From the plaintiff's allegations, which are admitted by the plea, with the additional facts which the pleas assert as also appearing in the survey, the case stands thus: The ship was found injured in her planks and timbers, so that she could not receive her necessary repairs at *St. John's*, and could not safely proceed to sea to procure such repairs elsewhere; and a great part of the timbers and planks, from the stern-posts to the stem, on both sides, were entirely rotten; that the repairs of the ship could not be done there, and she was not able, in her then present state, to go to sea, and she was, therefore, condemned and sold. In the case of *Steinmetz v. The United States Insurance Company*, (2 *Sergeant & Rawle's Rep.* 296.) the policy contained the same clause, in almost the same words, as in this policy. In that case, a survey was had, and the court considered it as settled by several cases, in which the construction of a similar clause had

been discussed, that where the condemnation was for unsoundness from decay, and for no other cause, the underwriter was discharged. In that case, the surveyors certified, that on examination of the schooner, "her stern, apron, *bends, and the most part of her timbers, are decayed, as also a considerable part of her plank, and that it would be eligible to sell her in her present state."

Tilghman, Ch. J., was of opinion, that the condemnation was founded solely on decay, no other cause being mentioned. He observed, that it was not said, in express terms, that the vessel was unsound or rotten, but it was said, that her principal parts were decayed, which is the same as rotten, and no other cause is assigned for her not being seaworthy; that where the particular parts found to be decayed are mentioned, and afterwards the general conclusion is drawn, that the vessel was not seaworthy, he considered rottenness as the cause of condemnation. *Yates*, Justice, thought it unreasonable to expect that the return of the surveyors should conform to the expressions used in the policy, which was not open to their inspection. It was enough if, in fact and substance, it agreed with it; and he considered the survey, in that case, as exhibiting a particular statement of facts equivalent to general unsoundness or rottenness in the hull; and that it brought the vessel within the true meaning of the clause in the policy. I can only express my entire acquiescence in the reasoning of these distinguished judges; it seems to me impregnable and conclusive. The return of the surveyors, in this case, states that a great part of the timbers and planks, from the stern-posts to the stem, on both sides, were entirely rotten; that repairs could not be made at *St. John's*, and that the ship was not able, in her then state, to go to sea. Now, her inability to encounter the further prosecution of the voyage, is attributed to no other cause than to the rottenness of her essential timbers and planks; and the general conclusion of incapability to proceed to sea, is a conclusion drawn from these facts; and this, in effect, amounts to a declaration, that she could not go to sea from rottenness. The allegation in the survey, that the ship was found injured in her planks and timbers, connected with the fact, that her timbers and planks were rotten, do not show that the injury arose from the perils of the sea, disconnected with the specified rottenness. The implied admission, in the survey, that the ship was reparable, does not contradict the fact that she was unseaworthy from rottenness, for ships materially *rotten and decayed, may be repaired. The contract between the parties is, that if the vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, then the assurers should not be bound by their subscription on the policy. That this event has occurred, appears to me to be so plain a proposition, that I abstain from pursuing the inquiry any further. There must be judgment for the defendants, with leave to the plaintiff to reply, on payment of costs.

Judgment for the defendants, accordingly

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN JANUARY TERM, 1823, IN THE FORTY-SEVENTH YEAR OF OUR
INDEPENDENCE.

NORTON *against* BARNUM.

To authorize a judge's order to hold a defendant to bail, in an action for a libel, the affidavit must not only state the libel or cause of action, but some special reason for granting the order.

On a motion of the defendant to set aside a judge's order to hold to bail, a supplemental affidavit of the plaintiff, to cure the defect in his original affidavit, will not be received.

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MOTION, in behalf of the defendant, that the order of *W. Howell*, first judge of *Ontario* county, directing the defendant to be held to bail, be vacated; and that the sheriff of *Ontario* be directed to deliver up the bail-bond, &c. This was an action for a libel; and the affidavit, on which the judge made the order, set forth the libel, and stated, that security for any damages to be recovered by the plaintiff, required that the defendant should be held to bail. The plaintiff now offered a supplementary affidavit, that the defendant was a young man, without family, having no visible property, except his printing press, &c.; and that he was informed, that the defendant intended to leave the state, &c.

Per Curiam. The cases of *Clason v. Gould*, (2 *Caines's Rep.* 47.) and *Van Vechten v. Hopkins*, (2 *Johns. Rep.* 293.) fully decide, that the affidavit on which the judge granted the order to hold to bail, is entirely defective. It follows, that the defendant has been improperly held to bail. The affidavit now offered by the plaintiff cannot be received. According to the practice of the Court of K. B., in *England*, a supplemental affidavit, for the purpose of curing a defect in the original affidavit, is not admissible. (*Molling v. Buckholtz*, 2 *Maule & Selwyn*, 563.) If a default has been entered on an imperfect affidavit, it will be set aside, notwithstanding the facts might warrant the entry of a default. Besides, an affidavit made now cannot retrospect, so as to authorize holding the defendant to bail, upon a defective affidavit. The motion must be granted.

Motion granted

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BOWEN *against* BELL.

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THIS was an action of *assumpsit*, tried before Mr. Justice *Woodworth*, at the *Washington* circuit, in *June*, 1821. The declaration contained a general count for land sold and conveyed to the defendant, and the money counts. It was proved, that the plaintiff owned four sixths of a certain farm, and the defendant two sixths, as tenants in common. It was agreed, that the land should be equally divided between them, and that the defendant should pay the plaintiff for one sixth part. A survey of the land was accordingly made, and mutual releases and quitclaim deeds were executed by the parties to each other, for their respective moieties, in severalty. The deed from the plaintiff to the defendant, for the north half of the farm, was dated *December* 16, 1813, and stated, that it was in consideration of the sum of one thousand dollars paid by the defendant, the receipt whereof was thereby acknowledged, &c. After the execution of the deeds, each party took possession of one half of the farm. It was admitted, that the defendant had not paid any consideration for the deed to him. A witness testified that, at the time of the division, it was agreed, that the defendant should pay to the plaintiff two hundred and fifty dollars for the one sixth which had been conveyed to him by *Abel Austin*. The defendant's counsel objected to the admission of parol evidence, on the ground that the agreement was within the statute of frauds; and being a special agreement, it could not be given in evidence under the general counts. But the judge overruled the objection, and admitted the evidence. It was proved, that the farm belonged to *Ellis Austin*, who died before 1816, leaving six heirs, from whom the plaintiff had purchased four shares. That at the time the releases were executed between the parties, the defendant claimed the whole farm by virtue of a sheriff's deed under a judgment and execution against *Austin's* heirs. That the parties, after much dispute, agreed to the division, and to execute releases as above stated. The value of the whole farm was estimated at two thousand dollars. The defendant's counsel moved for a nonsuit; but the judge refused to grant the motion, and decided, that notwithstanding the acknowledgment in the deed of the receipt of the consideration-money by the plaintiff, the plaintiff might recover on the parol agreement, which was not extinguished by the deed. The defendant's counsel then offered in evidence a deed from the sheriff of *Washington* county, dated *April* 6, 1818, reciting that, by virtue of a *fi. fa.* issued out of the Supreme Court, tested *November* 1, 1817, at the suit of *Lyman Hall* and *Samuel Ely*, against *Joseph Austin*, *Abel Austin*, and others, on a judgment against them, &c. for eighty-five dollars and seventy-six cents, he had taken and sold a certain lot of land in *Hebron*, formerly owned by *Ellis Austin*, to *George Bell*, (the defendant,) at public sale, for seventy-seven dollars and fifty-seven cents, he being the highest bidder,

Where the plaintiff agreed to release his right to a lot of land to the defendant, for a certain sum, which the defendant agreed to pay, and the plaintiff accordingly executed and delivered a deed to the defendant, in which he acknowledged the receipt of the consideration money, but which was not, in fact, paid, and the

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defendant took possession of the land: *Held*, that the plaintiff might maintain an action of *assumpsit* against the defendant to recover the amount of the consideration-money agreed to be paid by him; it not being a contract within the statute of frauds. (a)

Parol evidence is admissible to show that the consideration expressed in a deed to have been received by the grantor, has not been paid by the grantee.

A sheriff's deed is not admissible in evidence, without showing the judgment and execution under which he sold the land.

(a) *Whitbeck v. Whitbeck*, 9 Cow. Rep. 266. *Sinclair v. Jackson*, 8 Ibid. 543.

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&c. But the deed was rejected by the judge, on the ground, that no record of the judgment and execution was produced. The plaintiff proved, that the one sixth of the farm was worth two hundred and fifty dollars; and one of the witnesses stated, that the plaintiff bought *Abel Austin's* share subsequent to the judgment against the heirs of *Ellis Austin*.

The judge charged the jury, that the liability of the defendant depended on the question of fact, whether the plaintiff *did or did not execute the quit-claim deed to the defendant, and part with the possession of the land, on the defendant's agreeing to pay him for the share which he had purchased of *Abel Austin*, being one sixth part of the whole farm. The jury found a verdict for the plaintiff, for two hundred and twenty-five dollars and twenty-eight cents.

A motion was made to set aside the verdict, and for a new trial. The cause was submitted to the court without argument.

WOODWORTH, J., delivered the opinion of the court. This is not a case within the statute of frauds. The contract was perfected by giving the deed. The claim now is, to pay the value; the consideration to support the promise is the release of the plaintiff's title. It is immaterial what is the origin of the debt, provided it is founded on a lawful consideration. This action is not on a contract for the sale of lands, or any interest in lands. The law raises the promise to pay, and, in such case, it is not within the statute of frauds, although it be raised from an agreement concerning an interest in lands. In *Goodwin v. Gilbert*, (9 *Mass. Rep.* 514.) it is laid down as a general rule, that where land is conveyed by a deed poll, and the grantee enters under the deed, certain duties being reserved to be performed, as no action lies against the grantee on the deed, the grantor may maintain *assumpsit* for the non-performance of the duties reserved. The case of *Pomeroy v. Winship* (12 *Mass. Rep.* 514.) is very much in point. It was there decided, that if a *parol* contract be made for the sale of lands, and a deed be afterwards given pursuant to the contract, the bargain is then consummated, and the contract is liable to no objection arising from the statute of frauds. Actions have frequently been prosecuted in our own courts to recover the consideration for lands sold and conveyed. In *Shepherd v. Little*, (14 *Johns. Rep.* 210.) it was held, that *assumpsit* would lie to recover the consideration-money of land sold. There is, then, no obstacle in the way of a recovery on this ground; neither is there any force in the objection, that here was a special agreement proved, and that the count is general; for the evidence introduced went *to establish a promise to pay for *Abel Austin's* right, which was the one sixth; it was not a conditional, or special promise. The proof supported the declaration. The case last cited, also shows, that although the consideration expressed in the deed is acknowledged to have been paid, *parol evidence* is, notwithstanding, admissible, to show that it had not been paid. When one species of consideration is expressed, another, or different one, cannot be proved, neither can *parol* proof be admitted substantially to vary or contradict a written contract; but these princi-

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ples are inapplicable to a case where the payment, or amount of the consideration, becomes a material inquiry.

The sheriff's deed to the defendant was properly rejected, as no legal proof of a judgment and execution was offered. The evidence of *Olmsted*, that the plaintiff bought the share of *Austin* subsequent to the judgment against the heirs, does not appear to have been urged or relied on at the trial; if it had been, it was not competent proof of a judgment; but, admitting it to have been legal proof, *non constat*, that it was the judgment under which the sheriff sold; besides, there was no proof of an execution. If it were admitted, that the defendant purchased under a judgment obtained previous to the plaintiff's conveyance from *Austin*, it would not defeat the right to recover; for the defendant may have had, notwithstanding, substantial reasons to accept a title from the plaintiff, and immediately acquire the possession under it. He chose to purchase the plaintiff's right, and if he agreed to pay for it, which the jury have found, there was a good consideration for the promise, and, consequently, the title under the judgment was irrelevant, and immaterial. The motion for a new trial must be denied.

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Jan. 1823.

HALE
v.
ANGEL.

New trial denied.

**HALE against ANGEL.*

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IN ERROR, on *certiorari* to a justice's court. *Hale* brought an action of debt, in the court below, on a judgment obtained in a justice's court, the 16th of *April*, 1816, for 10 dollars and 73 cents. Execution had been issued on the judgment the 3d of *August*, 1816; but the constable absconded, and it was never returned. The defendant rested his defence solely on the ground, that, according to the *eleventh* section of the *twenty-five dollar act*, no action of debt will lie on a judgment of a justice's court, until after execution has been returned unsatisfied. On that ground, a verdict was given for the defendant below, on which the justice rendered judgment.

Where an execution, issued on a judgment in a justice's court, is not returned at all by the constable, the common law right of the party remains unimpaired, and he may bring an action of debt on the judgment. (a)

Per Curiam. The 11th section of the act (1 N. R. L. 387. sess. 36. ch. 53.) (b) directs the justice to issue execution on his judgment, and provides, that if the execution be returned, unsatisfied, it may be renewed, or the party recovering the judgment may bring an action of debt thereon, &c. There are no negative words, that the party shall not sue on the judgment until the execution has been returned. The common law right of bringing an action of debt, as soon as a judgment is recovered, remains unimpaired. The statute does not give the action of debt, but is merely explanatory of the common law right. We are, therefore, of opinion, that the judgment of the court below ought to be reversed.

Judgment of reversal.

(a) Vid. *Smith v. Mumford*, 9 Cow. Rep. 26.

(b) 2 Rev. Stat. 248.

ALBANY,
Jan. 1823.

RATHBUN
v.
MARTIN.

A soldier in the militia is not amenable to a court-martial of the United States, for having "failed, neglected and refused to rendezvous, and enter into the service of the United States, in obedience to the orders of the governor of this state, in compliance with the requisition of the president of the United States."

*RATHBUN against MARTIN.

REPLEVIN for books taken by the defendant from the possession of the plaintiff. The defendant avowed and justified the taking, as deputy marshal of the *United States*, acting under a certificate signed by the president of a court-martial, for collecting a fine, "for having failed, neglected and refused to rendezvous, and enter the service of the *United States*, as a soldier in the militia, in obedience to the orders of his excellency, *Daniel D. Tompkins*, governor of this state, on the requisition of the *United States*." To this avowry, the plaintiff demurred specially, and assigned nineteen causes of demurrer; and the defendant joined in demurrer.

A. Smith, for the plaintiff.

Shufeldt, for the defendant.

PLATT, J., delivered the opinion of the court. The questions presented on this demurrer, with two or three exceptions, are the same which arose in the case of *Mills v. Martin*. (19 Johns. Rep. 7.) In that case, judgment was given against the defendant, after mature deliberation; and the principal objections to the avowry, on which our judgment rested, in that case, occur here again in their full force. Without entering the wide field of discussion, we think it sufficient to repeat here, that, according to the constitution and laws of the *United States*, a soldier of the militia was not amenable to a court-martial of the *United States*, "for having failed, neglected and refused to rendezvous, and enter into the service of the *United States*, in obedience to the orders of the governor of this state, in compliance with the requisition of the president of the *United States*." And we are also of opinion, that if such court-martial had jurisdiction over such delinquent, the requisition of the president, and the orders of the governor, are not set forth in the avowry, with such particularity and certainty, as are required by the rules of pleading.

There are other grounds of exception, which it is deemed unnecessary to advert to. For the reasons of this decision, we refer to the opinion expressed by the court, in the case of *Mills v. Martin*. (19 Johns. Rep. 7.)

Judgment for the defendant.

N. B. In the cases of *Robert S. Livingston* against *Martin*, and of *J. F. Bartlett* against the same defendant the like judgments were given.

ALBANY,
Jan. 1823.CROOKSHANK *against* GRAY and his Wife.CROOKSHANK
v.
GRAY.

IN ERROR, to the Court of Common Pleas of *Washington* county. *Gray*, and *Margaret* his wife, brought an action of slander against *Crookshank*, in the court below. The declaration contained four counts. In the *first* count, the plaintiffs alleged, that the defendant, on the 6th of *June*, 1820, at, &c., falsely, wickedly and maliciously, &c., spoke and published of and concerning *Margaret*, the wife of *Gray*, and of and concerning a certain suit which had been lately tried before *J. W.*, a justice of the peace, in which the said *G.* was plaintiff, and the said *C.* defendant, and on the trial of which the said *M.* had been examined on oath, and had given material evidence, as a witness, for the plaintiff, and of and concerning the evidence so given by her, the following false, scandalous and malicious words, to wit: "You are a damned liar, and have sworn false," meaning that she had committed perjury. The *third* count alleged, that the defendant *C.*, falsely, &c., spoke and published, of and concerning the said *M.*, and of and concerning the action which had been so depending and tried before the said justice, and of and concerning the evidence of the said *M.*, *given by her on the said trial, as such witness, other false, scandalous and malicious words, to wit, "*Abraham Gray's* wife swore to a damned lie," meaning, &c. The defendant below pleaded the general issue, with notice of justification. The jury found the defendant not guilty on the *first*, *second* and *fourth* counts, and guilty on the *third* count, on which they assessed the damages of the plaintiffs, to 125 dollars. On the trial, a bill of exceptions was tendered to the court below, from which it appeared, that the action tried before the justice was trespass brought against *C.*, to recover damages for setting the dogs of *C.* on the plaintiff's cattle, and worrying them, so that one of them was killed. That the question before the justice was, whether the defendant *C.* had, by means of his dogs, killed a steer of the plaintiff's; that *M.*, the wife of the plaintiff, was a witness, and testified, that she saw the defendant's dog worrying the plaintiff's steer, in the corner of the defendant's lot nearest to the plaintiff's house; and that she was standing in the house, and the distance to the corner of the lot of the defendant was about thirty rods, and there were no trees or bushes in the way to obstruct her view. *S.*, a witness for the plaintiff, testified, that, before the trial in the court below, he heard *C.*, the defendant, say, that *Abraham Gray's* wife had sworn to a lie, and he could prove it; the witness understood the conversation to relate to her testimony on the trial before the justice, as to the distance at which she saw the dogs worrying the steer. *R.*, another witness, testified, that he heard the defendant say, that *Gray* had supported his action by the evidence of his wife, and *A. S.*, and that they had sworn to a lie, as to the distance of the ground; that

The words "You have sworn to a lie" are not in themselves actionable; but if it be averred, that they were spoken of and concerning the plaintiff, and of and concerning a trial, and the evidence given by the plaintiff in a cause pending in a court, the count contains a sufficient cause of action.

(a) Averments, by way of inducement, in the first count of a declaration,

[* 345] will aid a subsequent count, which would otherwise be defective, when it clearly refers to the first count, which is good.

(b) Where words charged as being slanderous, are proved to have been spoken in relation to a part of the evidence given by the plaintiff, as a witness in a cause, as to a particular fact, not material to the point at issue in the cause, they are not actionable

(a) *Ross* ads. *Rouse*, 1 *Wendell's* Rep. 475.

(b) *Griswold v. National Ins. Co.* 3 *Cow. Rep.* 96.

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the conversation was relative to the trial before the justice, and the evidence given by *Gray's* wife as to the distance from *Gray's* house to the south-west corner of the defendant's lot. The defendant below moved for a nonsuit, on the ground, that the evidence of *Gray's* wife, relative to the distance, was immaterial: and as the words spoken referred to that part of her evidence, they did not support the action. But the court below refused the motion, and the defendant excepted to the opinion of the court. The defendant then called several witnesses, who stated the testimony given by *Gray's* wife before the justice. The defendant *also proved the distance from *Gray's* house to the corner of his lot to be about 106 rods, and that there were trees and bushes on the line between *Gray's* house, and the corner of the lot, which would obstruct the view. The plaintiff then called witnesses who testified, that a person might, from *Gray's* house, see a steer or dog in the corner of the defendant's lot; that there was no obstruction to the view; and that the said *Margaret*, in giving her testimony before the justice, hesitated in mentioning the distance, saying, that she knew nothing of distances. The judge charged the jury, that it was immaterial whether the distance was 30 or 100 rods, if the jury were satisfied, from the evidence, that there was nothing to prevent her seeing the dog worrying the steer; that her evidence had been fully corroborated, and the defendant had wholly failed, in supporting his charge, or his notice of justification. The defendant excepted to the judge's charge. The jury found a verdict as above stated, on which the court below gave judgment for the plaintiff for the damages and costs, amounting to 175 dollars and 96 cents.

Billings and *Willard*, for the plaintiff in error.

Gibson and *Stevens*, contra.

The cause was submitted to the court on the following points and authorities.

For the plaintiff in error; 1. The words set forth in the third count, on which a verdict was given for the plaintiff, were not actionable. (1 *Johns. Rep.* 305. 2 *Johns. Rep.* 10. 3 *Johns. Rep.* 109.)

2. There is no averment applicable to the third count, that there had been a cause tried in which the wife of the defendant in error had been sworn and examined as a witness. When the words are not actionable, *per se*, but become so in reference to some extrinsic circumstance, there must be a special inducement. (1 *Chitty's Pl.* 382. 6 *Term Rep.* 691. 8 *East's Rep.* 430. 2 *Chitty's Pl.* 255, 256. *Cowper's Rep.* 682, 683, 684.) An *innuendo* cannot supply the place of an averment. (1 *Chitty's Pl.* 308. 1 *Saund. *Rep.* 234. n. 4. 4 *Bac. Abr.* 516. 8 *Johns. Rep.* 109. 4 *Co.* 19, 20.)

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3. That the averment introductory to the first count is not sufficient, even if it related to the third count; and as there are

no words of reference, it cannot be resorted to in aid of the third count; more especially where there is a verdict for the defendant on the first count. (1 *Chitty's Pl.* 397. 2 *Chitty's Pl.* 260. note.)

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4. The testimony of the wife of *Gray*, concerning which the words were spoken, was not material in the cause before the justice; and, therefore, the words do not amount to a charge of perjury. (*Chapman v. Smith*, 13 *Johns. Rep.* 81. *Hopkins v. Beedle*, 1 *Caines's Rep.* 347. 4 *Co.* 12. 16. 1 *Johns. Cases*, 279.)

5. That, if the evidence of *Mrs. Gray* was material, in relation to the distance, the words spoken were fully justified.

6. The judge misdirected the jury. A notice of a special justification is not an admission of the matters charged in the declaration. It forms no part of the record. (*Vaughan v. Havens*, 8 *Johns. Rep.* 109.)

For the defendants in error, the following points were made:

1. Every subsequent count in a declaration may refer to the first count, and the inducements to it. (2 *H. Bl.* 131. 2 *Wils.* 114, 115. *Cro. Eliz.* 240. 2 *Lev.* 193. 2 *Chitty's Pl.* 256. notes. 1 *Caines's Rep.* 348. 3 *Lev.* 166.)

2. After verdict, it is to be intended, that malice was proved. (13 *Johns. Rep.* 74.)

3. If the sense and meaning of the words spoken, are the same as those of the words alleged, it is sufficient. (8 *Johns. Rep.* 74. *Buller's N. P.* 5.)

4. The defendant below did, in substance and effect, charge the plaintiff's wife with perjury; for he contended, that the distance was such, that she could not see the dog touch the steer, &c.

5. The justification set out on the record shows the materiality of the distance, as to the fact sworn to by *Mrs. Gray*.

6. The justification was not made out by the defendant below.

*7. The jury were not misdirected by the court, whose duty it is to charge as to the law, or whether a justification had been made out or not, or whether the plaintiff had supported his action.

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WOODWORTH, J., delivered the opinion of the court. The verdict and judgment having been entered on the third count only, the first question is, whether it contains a good cause of action. It will be admitted, that the words of themselves are not actionable; swearing to a lie does not necessarily imply that the party has, in judgment of law, perjured himself. (*Hopkins v. Beedle*, 1 *Caines*, 347.) In order to sustain an action on the words charged, it is necessary there should be a *colloquium*, referring to the extrinsic circumstances, in relation to which the words were spoken. (1 *Chitty's Pl.* 382. 6 *Term Rep.* 691. 8 *East*, 430.) In the present case, it will be seen, that in the first count, the averment is, that the words were spoken of and concerning the plaintiff, and of and concerning the trial and the evidence given by the plaintiff in that cause: These averments are sufficient to show the application of the words, and being applied to the evidence given, the count contains a good cause of action.

ALBANY,
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M'KINLY
v.
ROB.

The defendant pleaded the general issue, with notice of justification.

At the trial, *Abel Dunning*, a witness for the plaintiff, testified, that on the 8th of *March*, 1820, the plaintiff entered a complaint before the witness, being a magistrate of *Montgomery* county, against *Reuben Slyter*, for the crime of perjury, which complaint was made on the oath of the plaintiff; that, afterwards, on the 20th of *March*, 1820, *Slyter* was brought before the witness, on a warrant, to answer to the charge made by the plaintiff; and the plaintiff was then sworn as a witness on the examination. The defendant's counsel objected, that the plaintiff ought not to be permitted to prove any thing which the defendant may have said in relation to the evidence given by the plaintiff on the complaint, as that was made on the 8th of *March*, but was alleged, in the declaration, to have been made on the 20th of *March*; and that the plaintiff ought not to be permitted to prove any thing which the defendant might have said in relation to the evidence given by the plaintiff on the 20th of *March*, as that evidence was given on the examination of the plaintiff, but not on the complaint made by him to the justice, as stated in the declaration. But the judge overruled these objections.

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*The plaintiff proved the words to have been spoken by the defendant, as stated in the declaration.

The defendant's counsel, in opening his defence to the jury among other things, stated, that if the jury, from the evidence to be introduced on the part of the defendant, should be satisfied, that the evidence given by the plaintiff, before the justice, was not strictly and literally true, though the plaintiff might have testified through misapprehension or mistake, the defendant's justification would be made out, and he be entitled to a verdict. The judge ruled that, in his opinion, the defendant would fail in making out a justification, unless he proved, that the plaintiff wilfully swore false; and in his charge to the jury, the judge, among other things, stated, that the defendant, in order to make out a justification, was bound to prove, that the plaintiff had, in giving his evidence before *A. D.*, the justice, wilfully and corruptly sworn false; that if the plaintiff, in giving that evidence, had, by mistake, misrepresented a fact, it was no justification to the defendant; and that it required the same evidence to sustain such a justification, as to maintain an indictment for perjury. The jury found a verdict for the plaintiff, for 500 dollars damages.

A motion was made to set aside the verdict, and for a new trial.

Reynolds, for the defendant, contended, 1. That the plaintiff ought to have proved the *complaint*, before the justice, to have been made on the day laid in the declaration. Where the *time* is material, it must be proved precisely as it is laid. In *Pope v. Foster*, (1 *Term. Rep.* 590.) which was an action for a malicious prosecution, the declaration alleged the trial and verdict to be on a certain day; and, on producing the record, it appeared to have been on a subsequent day; and Lord *Kenyon* held the variance to be fatal, and nonsuited the plaintiff; and the Court of K B

refused to set aside the nonsuit, and decided that the variance was equally fatal, though the day, in the declaration, was laid under a *videlicet*. (2 *Chitty's Pl.* 256. n. s. 2 *Bl. Rep.* 1001. 3 *Bos. & Pull.* 456.) In the case of the *United States v. M'Neal*, in the Circuit Court of the *United States*, *(1 *Gallis. Rep.* 387.) there was an indictment for perjury, which charged the perjury to have been committed at a trial before the court held on the 19th of *May*; and, on producing the record of the trial, it appeared, that the court was first held on the 20th day of *May*, the 19th being *Sunday*. and the court held the variance to be fatal.

2. The plaintiff was bound to prove the words to have been spoken in reference to the oath of the plaintiff on the *complaint*; and should not have been permitted to give evidence of any words spoken by the defendant in relation to the oath of the plaintiff on his *examination*, as a witness, before the justice. The complaint and the examination were distinct proceedings, and at different times. The examination was not a continuation of the complaint. *Chitty (Cr. L.* 31. 72. 82.) says, if the original information (or complaint) and evidence, taken before the warrant issued, contain a complete case, it is the practice, after reswearing the accuser and witnesses, on the examination, to read over the deposition, and add a fresh *jurat*. The judge considered the examination as a mere following up of the complaint. But might it not as well be said, that the indictment and trial were the mere following up of the examination: and, therefore, permit the plaintiff to give evidence of words spoken relative to the testimony of the plaintiff on these several occasions? If the charge had been, that the defendant had said that the plaintiff swore false on his *voire dire*, would he be permitted to prove words spoken in relation to his testimony given in chief? It was necessary to aver, that the words were spoken in relation to the oath of the plaintiff, in some judicial proceeding. Being, therefore, a substantial averment, it must be proved precisely as it is laid in the declaration. The rule is, that if the whole of an averment may be struck out without destroying the plaintiff's right of action; it is not necessary to prove it. (2 *East's Rep.* 452. 1 *Chitty's Pl.* 307.)

3. The charge of the judge, that it required the same evidence to sustain a justification of the slanderous words, as to maintain an indictment for perjury, was incorrect, and calculated to mislead the jury. The action of slander is to be determined on the same principles, both as to the admission *and effect of evidence, as any other civil action. Two witnesses are required to establish the guilt of the prisoner on an indictment; but one witness is sufficient to support a justification in an action of slander.

4. The jury ought to have been charged, that if they believed that the defendant intended nothing more than to charge the plaintiff with false swearing, and not to impute to him the crime of perjury, the defendant would be entitled to a verdict; and that the plaintiff was bound to show, that the words were spoken in the sense he ascribed to them.

In *Smith v. Carey*, (3 *Camp. N. P. Rep.* 461.) the action was for slander, and the words were, "He lived by swindling and rob-

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bing the public ;" with an innuendo, that the plaintiff had been guilty of "felony and robbery." The words were proved as laid ; but it appearing that they alluded to a transaction from which it might be inferred that the defendant meant only to charge the plaintiff with a *fraud*, Lord *Ellenborough* said, that the plaintiff was bound to show that the words were spoken in the sense he had ascribed to them ; and if they were satisfied that they were spoken with intent to impute, not felony, but merely *fraud*, there ought to be a verdict for the defendant. (2 *Bl. Rep.* 959. 961, 962. 5 *Bos. & Pull.* 335. *Peake's N. P. Rep.* 4. *Christie v. Cowell*, *Van Rensselaer v. Dole*, 1 *Johns. Cases*, 279. *Jarvis v. Hatheway*, 3 *Johns. Rep.* 180.)

Cady, contra, insisted, that the defendant had suffered no injury from the opinion of the judge ; for the case stated, that the plaintiff went on, afterwards, and proved the words as laid in the declaration, unless, perhaps, in that part of his charge in which he said that the variance was not material. That he was correct on that point, the cases of *Brooks v. Bemiss*, (8 *Johns. Rep.* 455.) and *Page v. Woods*, (9 *Johns. Rep.* 82.) sufficiently show. The case admits, that the plaintiff proved the words "as stated in the declaration," and that answers every objection.

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Reynolds, in reply, said, that the cases of *Brooks* and *Bemiss* and *Page* and *Woods*, were very distinguishable *from this case ; and the court do not say, that *time*, in all cases, is immaterial. The admission in the case, that the plaintiff proved the words "as laid in the declaration," refers merely to the words there charged to have been spoken, not to the other averments. On the construction given to the case by the plaintiff's counsel, it would have been absurd to have brought the case before the court.

WOODWORTH, J., delivered the opinion of the court. The day stated in the declaration is not material. There was no record of the complaint ; and if there had been, the declaration does not profess to set it out according to its tenor, or *in hæc verba*, but refers to it as matter of description, for the purpose of informing the defendant that the words referred to a *complaint* previously made. In *Brooks v. Bemiss*, (8 *Johns. Rep.* 455.) the defendant gave notice that he would offer in evidence a record of the trial of an indictment, of the term of *June*, 1810. When produced, it appeared to be 1809, and the court held that the variance was not material.

There is no foundation for the second point, for the plaintiff did prove the words to have been spoken in reference to the oath of the plaintiff on the complaint. The declaration avers, that the words were spoken concerning the evidence given on the complaint, which I understand as the evidence given when application was made to the justice, and upon which the warrant issued ; it says nothing respecting the subsequent examination. The case states, "that the plaintiff proved the words as laid ;" and if so, he must have proved, that the words spoken had reference to the

omplaint. Whether the plaintiff gave testimony on the examination of *Slyter* or not, is immaterial. The plaintiff does not charge the speaking of words relating to that, nor does it appear that any proof was given of the speaking of words by the defendant relating to the evidence given on the examination.

The charge to the jury was correct. The words spoken, in judgment of law, imputed the crime of perjury, inasmuch as they alleged the false swearing to have been before a magistrate, having competent authority to administer the oath, and take cognizance of the complaint. There was no qualification or explanation by the defendant, at the time, that the *plaintiff, through misapprehension or mistake, may have sworn false. It was too late, at the trial, to say, in substance, "The plaintiff has sworn false, but it may have proceeded from mistake, and may not have been corrupt. I did not intend by the words more than this." The defence, to be available, must be as broad as the charge; the evidence relied on was no justification. When a defendant has made a charge, that clearly imputes a crime, he cannot, afterwards, be permitted to say, I did not intend what my words legally imply. The intent must be collected from the expressions used, when they have a certain and definite meaning. The jury cannot rightfully indulge in conjectures that are not warranted by the legal import of the words spoken. But if it is doubtful whether the words impute a crime, or may be satisfied by ascribing to them a meaning which renders them not actionable, then the intent may become a fair subject of inquiry before a jury. This distinction is recognized by Lord *Ellenborough* in 3 *Camp. Rep.* 460., and by this court in 12 *Johns. Rep.* 257. The charge of the judge would not have been correct, if the principle of these cases had been applied to the words spoken by the defendant. We are of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

GARDNER *against* JONES.

IN ERROR, on *certiorari* to a justice's court. *Gardner* brought an action of debt against *Jones*, before a justice, for the amount of an execution issued on a judgment in a justice's court, in favor of the plaintiff, against one *Dennison*, for 31 dollars and 46 cents, which the defendant had received as a constable, on the 3d day of *October*, 1821, and which was not returned by him until the 18th of *March*, *1822. The plaintiff claimed the amount of the execution, under the 13th section of the twenty-five dollar act. There was a verdict and judgment for the defendant.

Per Curiam. The only question before the justice was on a point of law, whether the act extending the jurisdiction of justices

tion of justices of the peace, passed *April* 10, 1818, (sess. 41. ch. 94.) with this difference, that act the constable has 40 days within which to levy and return the execution.

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v.
JONES.

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The provision of the act of *April* 5, 1813, (sess. 36. ch. 53.) for the recovery of debts to the value of 25 dollars, giving an action

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against a constable who neglects to return an execution, extends to cases arising under the act extending the jurisdiction under the latter

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v.
HOBBS.

of the peace, (passed 10th of *April*, 1818, sess. 41. ch. 94.) gives the same remedy, by action of debt against the delinquent constable, as the act for the recovery of debts to the value of 25 dollars, (passed *April* 5, 1813. 1 *N. R. L.* 387. sess. 36. ch. 53.) (a) The act of the 10th of *April*, 1818, contains no express provision on the subject; but the *twelfth* section declares, that "all the provisions of the former act shall apply to this act, except as herein otherwise directed." The 11th section of the act of 1818 allows the constable 40 instead of 20 days, for levying the execution. In this case, the constable neglected, for above five months, to return the execution. We are of opinion, that the provision of the act of 1813, in favor of creditors, was intended to be adopted and extended to cases under the enlarged jurisdiction of justices of the peace; and that the judgment of the court below was, therefore, erroneous.

Judgment reversed.

(a) 2 *Rev. Stat.* 248.

JACKSON, *ex dem.* PARKER, against HOBBS.

A commission
issued to take

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the examination
of foreign wit-
nesses, must be
returned and
delivered to a
judge of the
court, and actu-
ally filed in the
clerk's office,
before the depo-
sitions taken
under it can be
read in evi-
dence. (b)

Where a
commission was
delivered by
the agent to a
judge, at *nisi prius*, who took
his affidavit as
to the manner
of his receiving
it, after the
cause was called,
but before the
trial was
commenced:

Held, that the
depositions an-
nexed to the
commission, so
opened by the
judge, were not
legal evidence.

It seems, that

where counsel objects to evidence, or to the opinion of the judge at the trial, he ought to state the grounds of his objection, so as to call the attention of the judge to the point of exception, and to afford the opposite party an opportunity of obviating it by additional proof.

(b) Vide *Jackson v. Perkins*, 2 *Wendell's Rep.* 308. *Oncida Manufacturing Society v. Lawrence*, 4 *Cow Rep.* 440.

mission had not been returned into this court, from whence it issued, nor into any of the offices of the clerks of the court, according to the statute. That it did not appear how, or in what manner, the commission, &c. came from the hands of the commissioners; that the affidavit annexed of *W. L.*, was not competent evidence of the regularity of the return, and that none of the requisites of the statute, as to the return of commissions, in such cases, had been complied with. The judge overruled the objections, and permitted the depositions to be read, and the counsel for the defendant excepted to his opinion. The defendant's counsel objected, in general terms, to several of the answers and parts of answers of the witnesses being read in evidence, but without stating any ground or reason for the objections; and all the objections *so made to the evidence, in the course of the trial, were overruled by the judge; and the defendant's counsel excepted to his opinion. The bill of exceptions, after stating the particular parts of the evidence so objected to, and that the judge overruled the objections and admitted the evidence, proceeded thus: "Whereupon, the counsel for the defendant did, on behalf of the defendant, except severally to the aforesaid opinions of the said justice, and insisted that the answers of the said *William Parker*, to the fourth and seventh interrogatories aforesaid, and of the said *Hepsebah Jaquith*, to the fourth and eighteenth interrogatories aforesaid, and of the said *Timothy Wood*, to the fourth and eighteenth interrogatories aforesaid, and also the paper aforesaid, were, and each of them were, not competent to be given in evidence aforesaid; and inasmuch as the said several matters," &c.

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HOBBY.

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Storrs, for the defendant, insisted on the several exceptions taken at the trial:

1. That the commission with the depositions under it, ought not to have been received; as it had not been delivered to a judge of the court, nor was endorsed as received by him, nor filed in the office of a clerk of the court, according to the statute. (1 *N. R. L.* 519, 520. sess. 36. ch. 56. sec. 11.) (a) The evidence taken under a commission is not admissible at common law, but under the statute; and unless it has been taken and returned in the manner prescribed by the statute, it cannot be competent, or read on the trial. So, depositions taken under the "act to perpetuate the testimony of witnesses," (1 *N. R. L.* 455. sess. 36. ch. 61.) (b) cannot be received as evidence, unless the directions of the statute are strictly observed. In *Massachusetts*, there is a similar statute; and in *Bradstreet v. Baldwin*, (11 *Mass. Rep.* 229.) the Supreme Court of that state decided, that a deposition not recorded within the time prescribed by the act, could not be read in evidence. (5 *Mass. Rep.* 219. 222.) The words of the statute must be construed in the common law sense. (6 *Mod. Rep.* 143.) Now, the *return* of a writ, &c. is the depositing of it in the court, or with the proper officer of the court, from which it issued. A delivery *of it to a judge of the court is not sufficient. (4 *Binney's Rep.* 113.)

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(a) 2 *Rev. Stat.* 393.(b) 2 *Rev. Stat.* 398

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The counsel then proceeded to discuss the several exceptions taken at the trial, as to the admissibility of different parts of the depositions annexed to the commission; but as the court gave no opinion as to any of the exceptions, except the first, it is unnecessary to state the arguments of the counsel.

Cady, contra, said, that by the *return* of the commission, the statute meant the delivery of it to a judge of the court, who is to open it, and endorse the manner of its being received by him, and file the same in the clerk's office; and "every such deposition, being so taken and returned, shall be allowed and read, and shall be deemed as good and competent evidence." This is not like the cases cited from *Massachusetts*, where the affidavits taken are required by statute to be *recorded*, and the *copies* of them are made evidence. The return and delivery of the commission to a judge of the court is sufficient, as regards the party, to entitle him to the benefit of the depositions. It is the duty of the judge, afterwards, to deposit the papers in the clerk's office.

The other exceptions taken to particular parts of the depositions were too general to be allowed. The counsel should have stated the precise grounds of his exception. (5 *Johns. Rep.* 467. 18 *Johns. Rep.* 544. 8 *East*, 280. 5 *Bos. & Pull.* 36.) How is this court to understand the objections made at the trial, unless the grounds of them are mentioned?

Storrs, in reply, said that the court do not approve of stuffing a bill of exceptions with the reasons of counsel. It is enough for him to lay his finger on the point excepted to, without stating his reasons. One of the points objected to was, that the declarations of *Molly Nutting* were not evidence. If the party does state the grounds of his exception, he cannot urge any other in his argument before the court. The court cannot infer or presume any fact not stated in the bill of exceptions. It is very different from a *case* made. (1 *Bac. Abr.* tit. *Bill of Exceptions*, p. 527, 528.)

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*PLATT, J., delivered the opinion of the court. The statute directs that the "examinations, and all exhibits produced to such commissioners, and proved by any witness, shall be annexed to the said commission, and *returned to the court out of which such commission issued*, closed up, and under the seals of two or more of the commissioners," and that one of the commissioners or an agent shall deliver the same to one of the judges of the court from whence the commission issued, and shall make affidavit before such judge, that he received the same from the hand of one of the commissioners, &c., "and such judge shall then open the same, and endorse upon the commission, as the case may be, either received by the hands of one of the commissioners, or upon the oath of the person who delivers the same, as appears by his affidavit, and subscribe his name to the same endorsement; and shall then deposit the said commission and return, with the said affidavit, in the office of the clerk of the said court, there to remain as a record: *and every such deposition, being so taken and returned, shall be*

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allowed and read, and shall be deemed as good and competent evidence as if such witness had been sworn and examined *viva voce* in open court, on the trial of such cause : and all parties shall be entitled to take copies of such depositions, as soon as the same shall be deposited in the clerk's office as aforesaid." (1 N. R. L. 520.) (a)

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I incline to the opinion, that, if insisted on, the commission must be actually *filed* in the clerk's office, before the depositions taken under it can be legal evidence. When a statute makes innovations on the common law rules of evidence, its positive requirements must be strictly complied with. In this case, the legislature have wisely provided against frauds and abuses, by prescribing the manner of taking such testimony, and the channel through which it shall be returned. The commissioner, or a special agent, is to deliver the sealed enclosure to the judge, who is to take proof, that it has been sent in the regular channel, and that it has not been opened nor altered : the judge is then to open the enclosure, for the *specified purpose* of endorsing on the commission a certificate, that such proof was made before him : so as to authorize the filing of the commission *and depositions ; and the judge is then required to deposit them in the clerk's office. And after these positive injunctions, the statute declares, that " every such deposition, *being so taken and returned*, shall be allowed and read as evidence," &c. "*Being so returned*" means not only that it shall be so delivered to the judge, but that it shall be so authenticated by his endorsement, and actually deposited by him in the clerk's office. The judge is made one of the agents for completing the return ; and, in legal signification, as well as in common parlance, a writ or a commission from a court of record, is not *returned*, until it is deposited in the office of the clerk of the court in which it is returnable. And there is good reason for requiring the depositions to be actually filed, before they are used as evidence. They are often prolix and voluminous ; so that without time to take a copy and to examine it deliberately, it is impossible to apprehend the testimony correctly, or to take the proper exceptions. Besides the party suing out the commission, generally knows, pretty accurately, what his witnesses have sworn, before the commission is opened ; and if he or his agent, who brings back the commission, may withhold it, till after the trial has commenced, it would give to such party an unfair advantage, and enable him to surprise his adversary. It is the right of either party to move the court to suppress the depositions, for fraud, partiality or irregularity ; and this cannot be done at *nisi prius*, nor until the depositions are filed.

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In this case, the commission, with the depositions sealed up, was delivered to the judge at the trial, and had not been endorsed by him, nor deposited in the clerk's office, and that specific objection was made by the counsel for the defendant, and overruled. This appears to me to be sufficient ground for awarding a new trial ; and I, therefore, deem it unnecessary to consider the other exceptions to particular depositions, included in the mass of tes-

(a) 2 Rev. Stat. 393.

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timony. I take occasion, however, to remark, that it is very questionable, whether any of the exceptions but the first, were so specific and distinct, as to entitle the party to any benefit of his exception. Good faith and the convenient administration of justice require, that the counsel who objects to evidence, or excepts *to the opinion of the judge, at the trial, should state the particular grounds of his objection; for the double purpose of calling the attention of the judge to the point of the exception, and to afford the opposite party an opportunity of obviating the objection by additional proof, which, perhaps, had been inadvertently omitted. In this case, the counsel first objected to the whole depositions, because they had not been filed. He afterwards objected to the reading of the depositions of particular witnesses, but said no more. Now, without explanation, the opposite counsel was not bound to answer such vague objections; nor was it the duty of the judge to notice them. It may be, that on a future trial, those exceptions, if explained, may be obviated by supplementary proof, if necessary. There must be a *venire de novo* awarded; the costs to abide the event of the suit.

Venire de novo awarded.

THE PEOPLE, *ex relat.* BLANCHARD, *against* THE JUDGES
OF THE COURT OF COMMON PLEAS OF WASHINGTON
COUNTY.

Where a cause comes before a Court of C. P. on appeal from a justice's court, under the act for extending the jurisdiction of justices of the peace, (sess. 41. ch. 94.) (a) the Court of C. P., on filing the return, cannot, on motion of

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either party, order the cause to be referred, on an affidavit, that the trial of the cause will require the examination of a long account, but must proceed to hear the cause, and decide on the admissibility of the proof offered in the justice's court.

AN alternative *mandamus* was granted, at the last term, directed to the judges of the Court of Common Pleas of *Washington* county, commanding them to vacate a rule of that court, in the cause of *Abraham Allen*, survivor, &c., appellee, and *A. L. Blanchard*, appellant, ordering the same to be referred, &c., or to show cause, &c.

From the return, it appeared, that *Allen* sued *Blanchard* before a justice of the peace, in an action of *assumpsit*, for 50 dollars. *B.* pleaded *non-assumpsit*, and *non-assumpsit infra sex annos*, to which *A.* replied, and the issues were tried before a jury, who found a verdict for the plaintiff, for *50 dollars damages, on which the justice gave judgment for the plaintiff with costs. From this judgment *B.* appealed to the Court of C. P. under the statute. (Sess. 41. ch. 94.) The appeal, bond given for security, and return of the justice, with the evidence, having been filed, the Court of C. P.; on the affidavit of *A.*, that the trial of the cause would require the examination of a long account, &c., on the motion of *A.* ordered the cause to be referred to three referees, which motion was opposed by *B.*, without effect. The Court of C. P. also certified that by the rules of practice of that court, a cause on appeal from a justice's court, under the statute, was considered as at issue, on filing the justice's return, &c., on the pleadings had before the justice, without any pleading in the Court of C. P.

(a) 2 Rev. Stat. 225.

The justices annexed to their return a particular statement of their reasons for granting the rule of reference, and why they had not vacated it, according to the command of the court. They conceived, that under the second section of the act for the amendment of the law, &c. (sess. 36. ch. 56. 1 N. R. L. 515.) (a) they had authority to order *any cause depending in that court*, to be referred, when it appeared probable that the trial would require the examination of a long account. That there was nothing in the act (sess. 41. ch. 94.) allowing appeals from justices' courts, which expressly prohibited the exercise of the general power of the Court of C. P., given to them by the former statute, &c.

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Billings and Willard, for the relator.

Gibson and Steevens, contra.

Per Curiam. We are not convinced by the reasoning of the judges of the Court of C. P., on the return to the alternative *mandamus*, that in such a cause as the one before them, a reference could be ordered. That court takes cognizance of *appeals* from courts of justices of the peace, under an express statutory provision. Independently of the statute, they have no jurisdiction. The 19th section of the act to extend the jurisdiction of justices of the peace (sess. *41. ch. 94.) (a) provides, that when the Court of C. P. become possessed of the cause, they shall proceed to the hearing thereof on the examination of the witnesses named in the return, who were sworn, and testified before the justice, unless they were objected to, and illegally admitted, and of the witnesses offered and rejected, if the court shall think it legal to admit them. According to our construction of the statute, the Court of C. P. must hear the cause, and decide on the admissibility of the proof offered in the justice's court. What restraint would there be on the referees, to prevent them from going, at large, into the merits of the cause, without regard to the former trial? We have decided, that it was not the intention of the statute to deprive either party, on the appeal, of a trial by jury. This is a common law right, which cannot be taken away, but by express legislative enactment, within the provisions of the constitution. A reference is not a common law proceeding; but a mere statutory regulation. The motion for a peremptory *mandamus* must be granted.

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Peremptory *mandamus* awarded

(a) 2 Rev. Stat. 225.

ALLEN *against* RIGHTMERE.

THIS was an action of *assumpsit*, tried at the *Cayuga* circuit, in *May*, 1822, before Mr. Justice *Platt*. *Lewis Toan* made a note, dated *April* 2, 1818, by which, for value received, he promised to pay the defendant, or order, six hundred dollars, on the first of

Where the defendant, being the payee of a negotiable promissory note, endorsed

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it, in these words: "For value received, I sell, assign, and guaranty the payment of the within note to John Allen, or bearer." Held, that this was an absolute engagement that the maker should pay the note when due, or that the defendant would pay it himself; and that the plaintiff was not, therefore, bound to prove a demand of payment of the maker, and notice of non-payment, as in case of an ordinary endorsement. (a)

April, then next, with interest. The declaration contained three counts: The first count was against the defendant, as endorser of the note, in the usual form: The second was upon his special guaranty *endorsed on the note in these words: "For value received, I sell, assign and guaranty the payment of the within note to John Allen, or bearer." Signed, *Lewis Rightmere*. The third count was for money paid, &c.

At the trial, the plaintiff proved the note and guaranty endorsed, and rested his cause. The defendant moved for a nonsuit, on the ground that the plaintiff, before he could be entitled to recover on the note, must prove a demand of payment of the maker, and notice of the demand and non-payment to the defendant, as endorser. The judge was inclined to grant the nonsuit, but permitted a verdict to be taken for the plaintiff, subject to the opinion of the court, on the question whether such proof was necessary. The case was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. Proof of demand and notice of non-payment were not necessary. The defendant's engagement is, in effect, that *Toan* should pay the note, or that he would pay it. It is the duty of the debtor to seek the creditor, and pay his debt on the very day it becomes due. As regards the maker of the note, and to render him liable, no demand is necessary. A demand of payment is necessary only to fix an endorser or a surety, whose undertaking is conditional. An endorser does not absolutely engage to pay. It is a conditional undertaking to pay, if the maker of the note does not, upon being required to do so, when the note falls due, and upon the further condition, that the endorser shall be notified of such default. The defendant insists that he stands in the situation of an endorser merely; but such is not the fact. The undertaking here is not conditional; it is absolute, that the maker shall pay the note when due, or that the defendant will himself pay it. In *Tillman v. Wheeler*, (17 Johns. Rep. 326.) and the cases there referred to, it was taken for granted, that, upon a guaranty such as this, no demand or notice would have been necessary. (12 Mass. Rep. 14.)

Judgment for the plaintiff.

(a) *Cumpston v. M Nair*, 1 Wendell's Rep. 457.

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*BUTLER against WRIGHT.

The defendant being payee of a promissory note, for 1500 dollars, endorsed it to the plaintiff, who endorsed and delivered it to a bank. When the note fell due, it was pro-

THIS was an action of *assumpsit*, brought by the plaintiff, as endorsee of a promissory note, against the defendant, as endorser. The note, dated November 22, 1816, was made by *Joseph A. Bostwick*, for 1,500 dollars, payable to the defendant, or order, at the *Middle District Bank*. The declaration was in the usual form, with the common money counts. The defendant pleaded *non-assumpsit* and payment. The cause was tried at the *Dutchess* circuit, in April, 1821, before Mr. Justice Yates. When the note

fell due, it was protested for non-payment, and regular notice of the non-payment was given to the defendant, who, afterwards, paid to the bank 800 dollars, upon the note, and promised to pay the residue. The bank, who owned the note when it became due, and who continued the holders of it, brought an action against the plaintiff, as second endorser, and recovered judgment against him, for 917 dollars and 69 cents, being the balance of the note, after deducting the 800 dollars paid by the defendant. The plaintiff, afterwards, at different times, made payments to the bank on the note, so that, at the time of the commencement of the suit, he had paid 380 dollars; but there was still a balance due to the bank, who held the note. It appeared, that the note and judgment had always remained the property of the bank, and the note had continued in the hands of their attorney ever since it was delivered to him, for the purpose of bringing a suit against the plaintiff for the balance due on it; and that the balance due on the judgment, in favor of the bank, against the plaintiff, still remained unpaid. The plaintiff's counsel was about producing proof of the protest of the note, and notice to the defendant, and of his promise to pay the balance to the bank, when the judge, on motion of the defendant's counsel, directed a nonsuit, on the ground, *that no action could be maintained by the plaintiff, on the note, under the circumstances stated by his counsel, until the whole note had been paid to the bank. A nonsuit was accordingly entered, with liberty to the plaintiff to move the court to set it aside.

Oakley, for the plaintiff, contended, that this action was maintainable, on the count for money paid, laid out, and expended. The money counts are founded on principles of equity, and are the appropriate counts under which a second endorsee, who has paid money on a note, can recover it against the first endorser. He cited *Chitty on Bills*, 190. 192. *Bayley on Bills*, 96. note. 13 *Johns. Rep.* 52. 353. 1 *Esp. N. P. Rep.* 261. *Peake's N. P. Rep.* 215.

P. Ruggles, contra, insisted, that the plaintiff could not maintain the action, as endorsee of the note, unless he had paid and got it into his possession, and could prove the making of it, the endorsement, and notice of non-payment. But the bank, being the holders of the note, have a right of action against the defendant as endorser, which must be supported by proof of the same facts. It is unreasonable, and unprecedented, that two persons can each maintain an action against another on the same note, at the same time, on the same proof, in support of their respective rights. The case furnishes no equitable ground on which the plaintiff can recover. If he recovers at all, it must be on the usual ground of action, as an endorser of a note against a prior endorser, on showing, that all the requisites which have been mentioned have been complied with, so as to give him a right of action as endor-ee against such prior endorser.

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tested by the bank for non-payment, and due notice thereof given to the defendant, who, afterwards, paid the bank 800 dollars, in part, and promised to pay the residue.

The bank sued the plaintiff, as endorser, and recovered judgment against him for the balance due on the note, after deducting the 800 dollars. The plaintiff, afterwards, paid

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380 dollars to the bank, who continued in possession of the note, which had not been fully paid. The plaintiff brought an action, and declared against the defendant, as endorser of the note, in the usual form; and, also, for money paid, &c., for the defendant, &c., and for money had and received, &c. : *Held*, that though the plaintiff could not maintain an action on the note, as it had not been fully paid, and was the property of the bank; yet, that he might sustain the action against the defendant, and recover the 380 dollars, paid by him, on the count for money paid, laid out, and expended for the defendant, at his request. (a)

(a) Vid. *Butler v. Wright*, 2 *Wendell's Rep.* 369. *Gregory v. Burrell*, *Ibid.* 391.

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SPENCER, Ch. J. The plaintiff cannot sustain an action on the note, as that would, in effect, be subdividing the cause of action, and subjecting the defendant to two actions for the same cause. In the case of *Hawkins v. Cardy*, (1 Lord Raym. 360.) the bill was for 46 pounds, 19 shillings, and it was endorsed to the plaintiff, specially, for 43 pounds, 4 shillings. Upon demurrer, the court were of opinion, that the declaration was bad; for that such *a personal contract could not be apportioned; and that no person could be made liable to two actions, where, by the contract, he was liable to one only. In the present case, there may be another objection to the plaintiff's right to recover on the note. He has no title to it; it is the property of the bank until it is fully paid. But I am, also, of opinion, that the plaintiff has a legal and just right to recover on the money count, as for money paid, laid out, and expended for the defendant, at his request. As between these parties, the defendant having directly endorsed the note to the plaintiff, the note itself would be evidence under the count for money had and received, in a suit by the endorsee against his immediate endorser. (*Chitty on Bills*, 190.) As regards the plaintiff, the defendant was under a legal obligation to take up the note, when it became due, and when it was ascertained, that *Bostwick*, the maker, failed to pay it. It is not questioned, that the plaintiff had a right, when he was called upon by the bank, to pay up the note; and had he done so, his remedy against the defendant, either by declaring on the note, or for money had and received, or for money paid, laid out, and expended, would have been clear and perfect. The fact exists, that the plaintiff has paid 380 dollars on the note, to the holders of it, which the defendant ought to have paid, with a further sum to satisfy it in full. Can the defendant make the objection, that he is subjected, not only to a suit by the plaintiff, but also to a suit by the bank, for the unpaid balance of the note? It seems to me, that he cannot. If he be allowed to do so, he takes advantage of his own wrong, which is against a maxim of the law. It is not only his duty, but in his power to remove the objection, at once, by paying the balance due to the bank. He will not be subjected to two suits, if he performs his duty. Suppose the plaintiff is unable to pay any thing more to the bank; is he to lose the money he has paid? Suppose a third person had, at the instance of the defendant, paid to the bank a part of this note; it certainly could not be objected, in a suit brought for the money thus paid, that the defendant would be doubly liable, first for the money paid, and also in a suit on the note by the bank. I cannot conceive the plaintiff to be in a different situation *than the one supposed. He had an implied authority, from the relation he stood in to the defendant, to pay the note, or any part of it, in exoneration of the defendant; and the money thus paid would, in judgment of law, be paid for the defendant, and at his instance and request. It is well settled, that where a party is legally bound to pay the debt of another, and does pay it, he can recover in an action for money paid, &c.; (2 *Comyn on Cont.* 152.) and there need be no special request to pay. On the grounds that the plaintiff has paid 380 dollars, on

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account of a debt, which was demandable both from the plaintiff and defendant, but which, as between these parties, the defendant ought to have paid; and that the plaintiff himself has not attempted to split up, or subdivide any cause of action he has against the defendant; that, in making the objection, the defendant rests it on his own wrongful act, in not paying the balance due to the bank; and that if he is exposed to another suit by the bank, he can remove that objection by fulfilling his contract with the plaintiff, I am of the opinion, that the defendant is liable in this action.

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The case may be one of the first impression. The cases cited on the argument throw little light upon it, and I have met with none analogous to it. It seems to me, that there can be but one opinion, upon the principles I have adopted, on the justice of the particular case.

I am of opinion, that the nonsuit ought to be set aside, and a new trial granted, with costs, to abide the event of the suit.

WOODWORTH, J., concurred.

PLATT, J., dissented. The contract of an endorser is, that if the *drawer* does not pay the note when due, and presented, then (if not discharged by want of due notice) the *endorser* will pay it to the *legal holder*; and I understand the law to be, that no party, who has *negotiated* the note, can ever maintain an action on it, until he regains it, or entitles himself to it, by paying the note. The contract is *entire*; it cannot be split up, so as to give a right of action to each of the subsequent endorsers, who may have made partial payments on *the note*; *at least*, so long as the note remains outstanding and unsatisfied. When the second endorser demands payment of the first endorser, he must be in a situation to reassign and deliver up the note; so that the first endorser may seek his remedy upon it. If the note be not delivered back, it may be put in further circulation; so that the first endorser may be compelled to pay it twice. He might, indeed, protect himself, by proving, that the note was overdue when last assigned; but the second endorser has no right to impose the burthen of such proof on the first endorser.

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In this case, the note was unpaid, in the hands of the bank, when the suit was commenced by the second endorser; and so far as I can discover, it would be an entire novelty to sustain this action. In such a case, of every day's occurrence, the silence of *Westminster Hall* is emphatic against the plaintiff's claim.

The contract being *special*, on the part of the endorser, the plaintiff cannot *vary* or *dispense* with the terms of it, and resort to his general counts. It may be, that if the second endorser has paid and taken up the note, he may then maintain an action for *money had and received*, against the first endorser. (*Bayley on Bills*, 96. note. *Pierce v. Crafts*, 12 *Johns. Rep.* 90.) The note, then, in his own hands, ready to be delivered up, may be evidence of money lent, as against the first endorser; but that is not the

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ject. "That on that occasion the witness saw a notice of protest addressed to Mr. *Spencer*, as endorser of a note of *Underhill & Seymour*, for about 1,200 dollars, at Mr. *Spencer's* office, but he did not recollect the day, or time of the day." All the testimony as to the notice at *Spencer's* office was objected to by the plaintiffs' counsel, on the ground, that the notice itself was not produced, nor any *proof of notice given to produce it, or any account of it. The judge admitted the evidence, subject to the objection.

A verdict was taken for the plaintiffs, subject to the opinion of the court, on a case containing the facts above stated.

S. M. Hopkins, for the plaintiffs, contended, 1. That the defendants had undertaken to give due notice of the non payment of the note to *Spencer*, the endorser, as was alleged in the third count in the declaration. This undertaking was made out, either by the general usage and custom of the country, that banks who receive notes for collection are, in case of non-payment, to give due notice to the endorsers, of which general usage the court will take notice; or by the proof of the usage given at the trial; or by the proof of the special undertaking of the defendants appearing in the case. Where a person, even gratuitously, undertakes to perform a service, he must go on and complete the performance, or be liable for the damages arising from his neglect. (2 *Johns. Cases*, 92. 95, 96.) That it was the general usage and custom for banks, in this country, to give notice of the non-payment of notes and bills left with them for collection, and to employ notaries for that purpose, was fully recognized by the court, in the case of the *Utica Bank v. Smith*, (18 *Johns. Rep.* 230—240.) The custom of merchants varies in different countries, in order to accommodate itself to particular courses of business, or other local circumstances. (3 *Dallas*, 368—424.) In *Ireland v. Kip*, (10 *Johns. Rep.* 491.) it was held to be the duty of the notary of the bank to give notice.

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2. Have the defendants performed their duty, and given legal and effectual notice of non-payment to the endorser? That they have not, is most clearly proved. *Spencer* deposes that he, in fact, received no notice, and the evidence is not sufficient to show that notice was left at his office. The giving of notice being a condition precedent, to fix an endorser or surety, the proof of it must be clear, strict and affirmative. It is plain, that neither *Wilson* nor *Jamieson*, the persons in the office of Mr. *Spencer*, believe that notice was left there, even supposing that a proper place at which to *leave a notice. An endorser of a note is entitled to strict notice. (*French v. Bank of Columbia*, 4 *Cranch*, 141.) If any notice was left at the office of the endorser, it does not appear what it was. Besides, the judgment in the suit brought by the plaintiffs against the endorser is conclusive, that he did not receive due notice.

N. Williams & Storrs, contra, insisted, 1. That the plaintiffs, having declared for a *nonfeasance*, and given evidence only of a *misfeasance*, had not maintained their action. There is no proof

of a consideration to support an *assumpsit*. If any action lies, it is an action on the case. Where the undertaking is voluntary and gratuitous, *assumpsit* does not lie for the non-performance. (*Thorn v. Deas*, 4 *Johns. Rep.* 97. 99. 1 *Chitty's Pl.* 487. 295. 5 *Term Rep.* 143.)

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2. Even on the ground of misfeasance, the defendants are not liable. It was no part of the duty of the defendants to give notice to the endorsers. They were bound merely to receive the money, if paid, or, in case of non-payment, to return the note to the plaintiffs, or to deliver it to a notary, or proper officer. There was no contract, express or implied, between the plaintiffs or defendants. The note was received by the defendants from the *Ontario Bank*, with the endorsement of the plaintiffs. An agent or bailee, without reward, is bound to use only ordinary diligence. (1 *Johns. Cases*, 174. *Cowp.* 479. 6 *Term Rep.* 12. 14 *Johns. Rep.* 232, 233, 234.)

3. But the evidence in the case shows, that the defendants did exercise due diligence, and that every thing was done which was necessary to charge Mr. *Spencer*, the endorser. No jury, on the evidence here given, would have hesitated to have found a verdict against him. If there is evidence, *prima facie*, to charge the endorser, the defendants are not liable. It is not stated that the endorser had any dwelling-house at C.; but merely that he had a law office there, and was, in fact, in *Washington*. It is incumbent on the plaintiffs to show that the notice at the office was insufficient, because the endorser had a dwelling-house in C. The defendants had no notice of the suit brought by the plaintiffs against Mr. *Spencer*, and are not to be concluded by the judgment *in that suit. Had the defendants been called in to aid the plaintiffs in that suit, they might have furnished sufficient evidence to have charged the endorser.

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4. But regular notice was given to the plaintiffs. No rule is better settled, that it is only necessary to give notice to the holder from whom the note was received, and it is his duty to give notice to the antecedent parties to whom he intends to resort. (*Chitty on Bills*, 166, 167. (180, 181.) 2 *Johns. Cases*, 1. 3 *Johns. Cases*, 89. 6 *East*, 14. note. 2 *Taunt. Rep.* 224.) This court have decided, that a notary is not bound to give notice to all the endorsers. (*Morgan v. Van Ingen*, 2 *Johns. Rep.* 204.) The notary, then, in this case, having done all that was required of him by the law-merchant, on what pretence are the defendants to be made liable, assuming even that he was their agent? Nothing more could have been required of the defendants themselves, than to give notice to the holders or owners of the note, there being no particular instructions on the subject.

5. The notary is an independent, sworn public officer, acting under the authority of the state, and was as much the agent of the plaintiffs as of the defendants. Notaries are recognized by the statute, and have fees established by law. (Sess. 38. ch. 262.) It is the notary, then, who is liable, if there has been any neglect of duty. If the defendants had been directed to have the note put in suit, and had delivered it to an attorney of this court, for

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that purpose, they could not be made responsible for his neglect. A post master is not liable for the acts of his assistants; (7 Cranch. 269., Cowp. 765. 1 Johns. Rep. 396.) they being sworn officers.

6. The record of the judgment in the suit of the plaintiffs against S., the endorser, can avail nothing, for *non constat*, but that the judgment was given for some other reason than a want of notice; and if it was offered to enhance the verdict, by including the costs of that suit, it was improper.

WOODWORTH, J., delivered the opinion of the court.

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Henry B. Gibson testified, that the uniform custom is, for the bank to cause notice to be given to all the endorsers; *he considered this as *the established custom and general understanding*; and that the bank appoint their own notary, with whom the customers have nothing to do.

The plaintiffs offered to produce other witnesses, conversant in banking business, to the same effect; but it was deemed unnecessary by the judge.

Seymour, cashier of the *Utica* branch, testified, that this note, not being paid, was handed to Mower, agent of Childs, the notary usually employed by the bank, to protest, and give notice of non-payment; that the bank has nothing to do with the notary; he considered the duty discharged when the note is delivered to him for protest; that it was no part of its business to transmit notice of non-payment. This testimony may seem, at first view, to be at variance with the evidence of Gibson; but when attentively considered, it is not opposed to it. Seymour does not speak of the established custom and general understanding between banks and their customers, but gives his opinion as to the legal liabilities of the *Utica* branch. He proves nothing in relation to the general usage of banks, nor the nature and extent of the understanding, on lodging notes for collection. He does not state any act done, by which the public might learn, that the *Utica* branch claimed an exemption from the operations of an established custom and general understanding, if any such exist. Gibson's testimony is not matter of opinion, as to the duties of banks; he stated, as a fact, that the uniform custom is, to give notice to all the endorsers, and so is the general understanding: he goes on to give his opinion, that a bank which should neglect it, would be liable; but of this part I take no notice.

Without examining the point, how far the court will take judicial notice of the general usage and custom in this respect, of which I have never heard a doubt expressed, before the argument of this cause, I think the evidence before us fully proves the general custom and understanding to be, as contended for by the plaintiff's counsel; and, if so, the plaintiffs, placing a reliance on this known and general rule, are entitled to the benefit of it, as against the defendants, until it be shown, that they did not acquiesce in the usage, and gave publicity to their dissent. The practice adopted *at the *Utica* branch also proves, that they give notice when a note is lodged for collection. Seymour admits, that the note was handed to the agent of the person usually employed

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to give notice ; whether he is correct in supposing that the duty of the bank was discharged, after this was done, is a distinct question, and will be subsequently examined. My conclusion, on this part of the case, is, that, from the acts of the parties, and the established usage of banks, the defendants must be considered as undertaking, in default of payment by the makers, to give notice to the endorsers.

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The next question is, whether a sufficient consideration is alleged to support the action. There is a well-settled distinction between actions *for nonfeasance and for misfeasance*. When one party intrusts the performance of a business to another, who, without consideration, undertakes, but wholly omits to do it, no action lies, notwithstanding the plaintiff may have sustained special damages ; but if the party enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for the misfeasance. In the case of *Thorn v. Deas*, (4 Johns. Rep. 96.) this question was ably discussed, and all the authorities examined ; and the result of the investigation sanctions this distinction. In *Elsee v. Gatwood*, (5 Term Rep. 143.) the law is laid down in the same manner. If the plaintiffs had declared for misfeasance, the question of consideration would not arise ; yet the action in that form would be equally well calculated to afford redress. I think this proposition warranted, inasmuch as the defendants did, in fact, enter upon the execution of the business, by delivering the note to *Mower*, for the purpose of giving notice. But there is no count in the declaration adapted to the proof respecting a misfeasance. The third count is the only one on which the plaintiffs can rely ; and that is for a nonfeasance, which cannot be supported, unless founded on a valid consideration. I have already stated my views of the nature and extent of the contract in this cause. The promise of the defendants is founded on the delivery of the note by the plaintiffs.

*An injury to one party, or a benefit to another, is a sufficient consideration for a promise. (*Miller v. Drake*, 1 Caines, 45. *Foster v. Fuller*, 6 Mass. Rep. 58.) It will be conceded, that, had this been an undertaking by an individual, to demand payment and give notice, it would be a *nudum pactum*, unless something more appeared than is disclosed in this case ; for no benefit could result to the promisor in performing the service, and paying the money over immediately after he received it ; but the case of banking institutions is widely different ; they are established to aid the commerce of the country, by giving facilities to the moneyed operations of the community, and on the strength of credit, to enlarge the amount of actual capital. They have a powerful influence in enforcing punctuality in payments, and thereby producing a state of confidence essential to commerce and useful to all classes. The operations of a bank principally consist in loaning money and discounting notes, which are direct and immediate sources of profit. Incident to the business of a bank, is the receiving of notes from their customers for collection ; when paid, the money is placed to the credit of the depositor, and remains in bank until

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called for. Where business of this kind is done extensively, it is evident that more or less of the money collected may be calculated on with safety to remain in the vaults of the bank. In some instances, the money may be immediately withdrawn; in others, it will remain a considerable time; the amount being subject to be increased or diminished, from week to week, and varying according to the sums collected and withdrawn by the depositors, it is possible that, at some particular time, a bank may not have a cent of the money collected; but from the course of business, and the occasions for using money, being so diversified among different individuals, and the certainty that money will be permitted to remain in a place of such safety, until really wanted, there is no reasonable doubt, that large sums frequently, and to some amount, at all times, may with entire prudence be calculated on. The amount of notes discounted will depend not only on the actual capital paid, but on various other considerations not necessary to be considered. As one important item, the deposits may be mentioned:—If a bank has been in successful operation for a number of years, and the deposits have never been less than a certain amount, though often greatly exceeding it; if the prospect of future business affords no ground to expect a diminution, then the deposits will be considered, by the most prudent board of directors, as authorizing an increased discount, beyond what the capital alone would justify. Notes being discounted for short periods, at the expiration of which payments may be demanded, the bank is thereby enabled to regulate its operations, so as not to incur risk in the event of sudden fluctuations, whereby the deposits may be wholly withdrawn or greatly diminished. No evidence was necessary on the trial to show such a practice; it is sufficient that it is incident to a bank, and may be a benefit, which I apprehend will not be questioned. The custom of receiving notes for collection is not founded on mere courtesy, but with a view to the interests of the institution, and is the source from whence profit may and does arise. It is no answer to this view of the subject to say, that banks have no fees or pecuniary advantages from the notes lodged for collection, by which is meant, I presume, specific compensation. *Seymour* states this in his testimony; and although undoubtedly true, it does not operate against the argument I have advanced; neither is it to the purpose, that in the opinion of the defendants' cashier, notes received from the *Ontario Bank* were rather a burden than an advantage, because the money, if paid, would be immediately withdrawn. In the particular instance before us, such opinion must be founded on what had been the practice previously; but as to the future, it is merely conjecture. For aught that appears, this money might have lain for months before it was demanded; be that, however, as it may, it is enough for the plaintiffs to establish, that the deposit of money in a bank, as a general proposition, is beneficial. This, I apprehend, has been done, and consequently the delivery of the plaintiffs' note for collection, when nothing appears that either party knew or expected that the money would not be paid, must be considered as an act not imposing a burthen, but as con-

ferring a benefit, from which profit, however small, might probably arise. This act, then, was a good consideration for the defendants' promise, and removes the objection taken on that ground. It is not necessary to show, that profits would inevitably accrue to the bank; it is enough that a reasonable expectation exists that such will be the result. In the case of *The Union Turnpike Company v. Jenkins*, (1 Caines, 389.) it was held, that the expected profits to accrue from the stock, for which *Jenkins* had subscribed, was a sufficient consideration to uphold the promise. The judgment of reversal turned on other grounds, and left that point untouched, as was adjudged by this court, in 9 *Johns. Rep.* 217.

The next question is, Has legal notice been given to the endorser? The law has so well settled what shall constitute legal notice, as to be familiar to persons usually employed to protest bills and notes. When the party resides in the same city or town where the demand is made, notice must be personal, or left at the dwelling-house. (*Ireland v. Kip*, 10 *Johns. Rep.* 490.) If the endorser resides in a different place, notice must be forwarded on the day of demand, or the day after, and by the next mail, directed to the endorser, and advising him of the protest. In case of a temporary removal of an endorser from the place where payment is to be made, notice left at his last place of residence there, will be sufficient. (*Stewart v. Elen*, 2 *Caines*, 121.) Demand and notice, in every case, are a condition precedent to the holder's right to recover. (*Berry v. Johnson*, 9 *Johns. Rep.* 121.) And in every case, the endorser is entitled to strict notice. (*French v. The Bank of Columbia*, 4 *Cranch*, 164.)

If the defendants have complied with these requisitions, then without reference to the termination of the suit against the endorser, they are exonerated, for they were not parties to that suit, nor are they concluded by it.

Mower testifies, that on the day the note fell due, he delivered notice at the post-office, or at the law office of *Spencer*, the endorser, but could not tell which; that in the afternoon of the day the note was protested, and previous thereto, he inquired of *Wilson*, *Spencer's* partner, if certain funds were applicable to the payment of the note, who answered, he had no instructions. The witness further testified, that he had no recollection of ever leaving at the post-office a notice of protest, addressed to an inhabitant of the village, and believed the notice was left at *Spencer's* office, but cannot say, positively, that it was not at the post-office. From this evidence, the presumption is rather stronger, that notice was left at the endorser's office, than at the post-office; still, however, the fact is doubtful. The notice at one place would be sufficient; at the other, a nullity. The question is not, what inference the jury might draw, but what testimony does the law require in this case. We have seen, that this is a condition precedent, and that strict proof is required. The law has allowed the endorser this protection; nothing short of clear proof of notice shall subject him to liability.

The reason and justice of requiring clear proof against a surety will not be doubted. It is imposing no hardship on a party, to

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require the proof supposed to be in his power ; it is in coincidence with the general principles of law, in respect to sureties. A relaxation of this rule would make the liability of sureties depend on the various and different opinions, which different juries would form on the same state of facts : a doctrine so mischievous ought not to be tolerated. If the witness had understood his duty, he would have known, that notice at the post-office was unavailing ; and, as there cannot be a doubt but that he intended to serve the notice legally, there would seem to be no difficulty in speaking positively, that it had not been left at the post-office, if that was the fact. On reviewing this evidence, there can be no surprise, that the plaintiffs failed to recover against the endorser. I think it equally clear, that, in this respect, the defendants have failed in making out their defence.

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I have already stated, in general terms, that the defendants were bound to give notice to the endorser ; and as effectual or sufficient notice has not been given, it becomes necessary to examine, more particularly, whether the defendants have, in legal contemplation, shown a compliance with the duty which had thus devolved on them. The holder of a note, who requires the service of notice upon the endorser, if he wishes to possess evidence of the fact, must, of necessity, substitute another person to perform the service. In the case of a corporate body, it can be performed in no other way than by substitution. Does the engagement *of a bank to give notice, guaranty absolutely, that legal service shall be made ? or is the understanding satisfied, if the bank selects an agent to do the business, of known fidelity, and, in every respect, competent to discharge the duty ? In order to decide the extent of the defendants' undertaking, the nature of the business to be performed, and the manner it is generally executed, must be considered. The plaintiffs must be presumed to know the course of practice to charge an endorser. Banks employ some suitable person to make protest of notes, and to give notice. The plaintiffs would have done the same had they retained the note. It would, therefore, be manifestly against the understanding of the parties, as well as unjust, to construe the contract otherwise than according to the known and uniform course of proceeding in such cases ; that would be extending the liability, in case of default, arising from whatever cause, instead of placing it on the ground of negligence, upon which it ought to rest. The defendants, then, had not, as *Seymour* supposes, discharged the duty, merely by handing the note to a person for protest ; but they must meet the inquiry as to the competency and fidelity of the agent selected ; and if, in this respect, there is no cause for complaint, they have done all that was required ; their defence is complete. The controversy being, then, narrowed to this single point, the question is, Have they shown, affirmatively, what I conceive they were required to do, that *Mower* was in every respect, qualified to perform the duty according to the principles I have laid down ? If the note had been delivered to a notary, it would present a different case. Notaries are officers appointed by the state ; confidence is placed in them by the gov

ernment. This may be evidence sufficient to justify an agent in committing to them business relating to their offices, although, in point of fact, it might subsequently appear, they did not possess the necessary qualifications. But there was no notary in the village of C., and as no protest of a promissory note, or inland bill of exchange, is necessary, nor is it evidence of the facts stated in it, the note might, equally well, be placed in other hands. (6 *Wheat. Rep.* 140. 572.) All the evidence given by the defendants is, that *Mower* was a clerk in the bank, and agent of *Childs*, *the notary usually employed by the bank to protest, and give notice of non-payment. He received notes from the bank, and delivered them to *Childs*. If the latter sent him to serve notices, they were undoubtedly accompanied with instructions, so that the general competency of *Mower*, when no instructions were given, is left undecided. There is no proof to show that a proper agent was selected; in addition to this, I think there is affirmative evidence of *Mower's* want of skill, and necessary knowledge, derived from the manner he performed the service. If the steps necessary to charge an endorser had been familiar to him, his mind would not have been in doubt, whether he left the notice at the post-office, or at the endorser's office. He would know, that in the former case, the notice was a nullity. We cannot suppose he would do a nugatory act knowingly; if he was doubtful whether such notice was not effectual, the course he pursued will cease to excite surprise. Owing to this cause, I apprehend, he did not testify in so decided and unequivocal a manner, as would render the endorser liable. *Mower* also testified, that in the afternoon of the day on which the protest was made, and after it was actually made, as *Jamieson* states, he called on *Wilson*, at the endorser's office; *Mower* then had a notice of protest, and *Jamieson* saw it; yet, instead of serving it, he contented himself with inquiring whether certain funds were applicable to the note, and being answered by *Wilson*, that he had no instructions, he leaves the question of actual service in uncertainty. I cannot persuade myself, from an attentive consideration of these facts, that the agent employed by the bank was well qualified to execute the business committed to his care. I do not hold him responsible for want of memory; but judging from his acts, he seems not to have possessed accurate knowledge of the business he had undertaken.

In either point of view, this presents a case of negligence, for which the defendants are responsible; and on this ground the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

**THALIMER against BRINKERHOFF.*

THIS was an action of *assumpsit*. The declaration contained the common counts, for money had and received to the plaintiff's use, money lent, &c., and an *insimul computassent*. Plea, *non-assumpsit*. The cause was tried at the *New-York* sittings, in *June*,

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H. T., who claimed land as heir at law of his father, and who was about to commence

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suits to recover the possession of it, entered into an agreement with the plaintiff, who had married his sister, by which he covenanted, in consideration of the premises, &c., to convey to the plaintiff the one fourth part of the property which should be recovered; and the plaintiff, in consideration of such covenant, &c., promised

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H. T. to pay, bear, and sustain, the one half of all the expenses which might occur in the prosecution of the intended suits, &c. The defendant, who drew the agreement, and subscribed it as a witness, as attorney of *H. T.* and the plaintiff, brought actions of ejectment against the persons in possession of the land; and afterwards, by virtue of a power of attorney from *H. T.*, for that purpose, but without the knowledge of the plaintiff, compromised with the tenants, and received from them a large sum of money.

In an action of *assumpsit* for money had and received to the use of the plaintiff, brought by him to recover the one fourth part of the money so received by the defendant: *Held*, that the agreement between the plaintiff and *H. T.* was illegal and void, under the first section of the act to prevent and punish *champerty* and maintenance; (sess. 24. ch. 87. 1 *N. R. L.* 172.) (a) and that the plaintiff could not, therefore, recover against the defendant. (b)

To make such a contract illegal and void, for *champerty*, it is not necessary that the land should be held adversely.

(a) 2 *Rev. Stat.* 691.

(b) *Vid. Best v. Strong*, 2 *Wendell's Rep.* 319. *Thalimer v. Brinkerhoff*, 6 *Cow. Rep.* 90. *Pennington v. Townsend*, 7 *Wendell's Rep.* 276.

1821, before Mr. Chief Justice *Spencer*. At the trial, the plaintiff gave in evidence an agreement between him and *Henry R. Teller*, to which the defendant was a witness, and was drawn by him, or under his direction, dated *April* 10, 1807. This agreement recited, that whereas *H. R. Teller* is the heir at law of his father, *Isaac Teller*, deceased, and, as such, laid claim to certain property situate in the city of *New-York*, fronting on *Broadway*, formerly known by the name of the "negro burying ground," and possessed by *J. Teller* in his life-time; and whereas it was the intention of the said *H. R. T.*, to institute a suit, or suits, for the recovery of the whole, or part of the said property; and whereas *P. T.*, the plaintiff, intermarried with the sister of the said *H. R. Teller*, and, in consequence of that connection became justly, though not legally, entitled to a portion of the said property; the agreement, therefore, witnessed, that *H. R. T.*, in consideration of the premises and covenants therein after contained, for himself, his heirs, &c., covenanted, promised and agreed, with *P. T.*, the plaintiff, his heirs, &c., that, on the recovery of the whole, or any part of the said property, he would execute to the plaintiff a good and lawful conveyance for one fourth part of the property recovered; and the plaintiff, in consideration of the said promise, covenanted and agreed with *H. R. Teller*, that he, the plaintiff, would pay, bear and sustain the one half of all the expenses that might occur in the prosecution of the suit or suits, to be instituted by *H. R. T.*, for the recovery of the property, if such suit or suits should prove unfortunate; but in case the suit or suits should prove successful, then to pay, bear and sustain, one fourth of all the expenses; and it was agreed, that the expenses should be mutually advanced and borne by and between the parties, in the proportions above mentioned.

The plaintiff proved, that the defendant, as the attorney of the plaintiff, and *Henry R. Teller*, in *June*, 1809, commenced a number of ejectment suits against persons occupying different parts of the property mentioned in the agreement; and that the defendant, afterwards, without the knowledge of the plaintiff, by virtue of a power of attorney from *H. R. Teller*, compromised the suits with the respective tenants; and, on such compromise, received 54,000 dollars, besides the costs of suit. The power of attorney, which was set forth in the bill of exceptions taken at the trial, was dated *November* 22d, 1813, and fully authorized the defendant to make compromises, and to sell and convey all such parts of the land claimed, and upon such terms as the defendant might think fit and proper. The plaintiff claimed one fourth part of the money thus received by the defendant, as so much money had and received to the use of the plaintiff, under and by virtue

of the agreement between him and *H. R. T.*, and the retainer of the defendant, as their attorney, under it. The plaintiff having rested his cause, the defendant's counsel moved for a nonsuit, on the ground, that the agreement between the plaintiff and *H. R. T.* was unlawful, as being against the statute to prevent and punish champerty and maintenance, and, therefore, void. The chief justice was of opinion, that the agreement was unlawful and void, and could not, therefore, be the foundation of an action; and, accordingly, directed the plaintiff to be called and nonsuited. The plaintiff's counsel tendered a bill of exceptions to the opinion of the chief justice.

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S. Jones, for the plaintiff, contended, 1. That the agreement *between the plaintiff and *H. R. Teller* was not unlawful, nor against the statute to prevent and punish champerty and maintenance. *Maintenance* is an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. (4 *Bl. Com.* 134, 135.) It is an interference by one who is a perfect stranger, having no interest whatever in the subject of controversy, to the disturbance of the community, by stirring up suits. *Champerty* is merely a species of maintenance, for the consideration of having some part of the thing in dispute, or some profit out of it. The strictness and severity of the law, as found in the ancient cases, has, in later times, for very obvious reasons, been much relaxed; so that, if the person accused of this offence can show that he has any affinity or relationship to a party, he may lawfully advise and aid him in his suit, by money, or otherwise. So, if he has any interest whatever, legal or equitable, in the land in controversy, however contingent or remote it may be, he may maintain the party in the suit. (2 *Hawk. P. C. B.* 1. ch. 83. s. 1—13. 17, 18. 21, 22. *Wickham v. Conklin*, 8 *Johns. Rep.* 220. 227. 3 *Burns's Justice*, 117.) Then, had not the plaintiff, in right of his wife, the sister of *H. R. Teller*, a possible or contingent interest in this land? She might become heir to her brother, in case he died without issue.

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2. This is not *champerty*, unless the party is in adverse possession. (8 *Johns. Rep.* 227, 228.) The agreement recites, that the ancestor of *H. R. T.* had a title to the land, and that *H. R. T.* was the owner. He, or the defendant, as his attorney, cannot be allowed any intendment as to an adverse title. (9 *Johns. Rep.* 102. 163. 174. 1 *Johns. Rep.* 156. 8 *Johns. Rep.* 220. 3 *Johns. Cases*, 124. 16 *Johns. Rep.* 293.) There is no evidence of an adverse possession; and if there was none, it was a valid agreement to pass one third of the property to the plaintiff, or his wife, in consideration of blood.

3. But even if this agreement was unlawful, neither *H. R. Teller*, nor the defendant, could take advantage of it. *Teller* has received the full benefit of the agreement. It is good as between parties to it; and is void only as against strangers, or third persons having right. But the tenants have *compromised, without taking any advantage of this objection to the agreement. (*Co. Litt.*

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369. a. *Cro. Eliz.* 445. *Hawk. P. C. B.* 1. ch. 86. s. 3. 9 *Johns. Rep.* 55. 2 *Roll. Abr.* 115. *Bro. Abr. Feoff.* pl. 19.) On what principle can *Teller*, or the defendant, be allowed to set up this defence? The ground of the plaintiff's action is, that the defendant has received money as his attorney; and the agreement was introduced collaterally, to show the amount to which the plaintiff was entitled.

E. Williams and *W. W. Van Ness*, contra. 1. The plaintiff cannot recover in this form of action. The owners of aliquot shares of the money cannot maintain separate suits for their respective proportions. The action is against the defendant as attorney, retained by *Teller* and the plaintiff jointly. There is but one *assumpsit*, and only one suit can lie. *Teller*, therefore, ought to have been joined with the plaintiff in the action. This objection might have been made at the trial, for the defendant is not obliged to plead the misjoinder of plaintiffs in *assumpsit*: And though the objection was not, in fact, made at the trial, it may be raised here, for it is not a matter which, had it been stated, could have been supplied by the plaintiff at the trial. (*Beekman v. Frost*, 18 *Johns. Rep.* 544.)

2. *Assumpsit* for money had and received does not lie; for by the agreement between *Teller* and the plaintiff, the latter was to have one fourth of the *land*, if recovered. Nothing is said, by which it would appear that he was entitled to demand any *money*. The plaintiff, therefore, should have brought an action against *Teller* for a breach of the contract.

3. The agreement was void, as against the statute to prevent champerty and maintenance. Our statute provides for the prevention of the various offences of this nature to be found in the *English* statutes. *Champerty* and maintenance are distinct offences. A conveyance of a right of entry may be good, as between the parties, though void as to third persons; but it is different as to *champerty*; and the case of *Wickham v. Conklin* (8 *Johns. Rep.* 227.) proceeds on the distinction. The first section of the statute provides *against champerty, and the eighth and ninth sections against buying pretended titles, and maintenance. A father may support his son in a suit to recover his right; but he cannot *buy* of his son a portion of the subject matter of dispute, without violating the first section of the statute. No case can be found to show that such an agreement is lawful and valid between the parties. It is not necessary to prove an adverse possession in such a case; but if it were necessary, we contend, that the agreement expressly admits the fact of an adverse possession. The contract is, by the statute, illegal, corrupt and void. The consideration of relationship, or affinity, cannot avail. No consanguinity can justify the buying of a part of the subject matter of a suit. The plaintiff, in right of his wife, had no interest whatever in the land, antecedent to, or independent of the agreement. Any supposed *natural* right in Mrs. *Thalimer* cannot be recognized in a court of law or equity, contrary to the law of descents, established by the legislature.

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But it is said, that the defendant cannot set up this objection to the agreement, as a defence. He is not called upon for a defence, until the plaintiff brings a proper suit. Though under the 8th and 9th sections of the statute, the defendant might not be entitled to make the objection, yet he may, under the first section, which makes the agreement, as between the parties, void. The defendant stands in the place of *H. R. Teller*, in regard to this suit. Admitting the agreement to be valid, the *casus fœderis* between the parties to it has not occurred. The defendant received the money under the power of attorney from *Teller* alone, and to him only is he accountable for it.

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D. B. Ogden, in reply, said, that the objection as to the form of the action, was not made at the trial, and could not, therefore, be raised here. Had it been made at the trial, the plaintiff might have shown a settlement among the parties, by which the defendant was to retain one fourth of the money in his hands for the use of the plaintiff. True, this is an action for money. A compromise was made with the tenants under a power from *H. R. Teller*, who was the only person who could give such a power but it was, nevertheless, *as to one fourth, money received to the use of the plaintiff.

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Suppose all the children of *Isaac Teller*, the ancestor, should agree together, notwithstanding a devise of the whole estate to one of them, to divide it equally between them, and that a suit should be brought to recover any part of it, in the possession of another, the expenses of which suit should be borne by them all ratably, would such an agreement be unlawful and void under the statute? Whatever may have been the ancient law on the subject; yet, "that such a doctrine," says Mr. Justice *Buller*, (4 *Term Rep.* 340.) speaking of some of the early decisions, as to maintenance, "repugnant to every honest feeling of the human heart, should be soon laid aside, was to be expected. Accordingly, a variety of exceptions were soon made." And we may add, that if such an agreement between a brother and sister, or blood relations, as to the estate of their common ancestor, should be declared to be an offence, under this statute, it would be a disgrace to our law. Consanguinity or blood is a good consideration. If a feoffment would not be void, as between the parties, can a mere agreement for a conveyance be void?

SPENCER, Ch. J. It has been insisted, on the argument, that the agreement is not unlawful: 1. Because it does not appear, that the lands, for which suits were to be instituted, were held adversely. 2. Because, although *H. R. Teller* was the heir at law of his father, and the legal owner, the agreement carried into effect an equitable right, on the part of his sister, to have a proportion of the property, and that it was competent for the heir at law to waive his legal right, so far as to admit her to participate in the division of the estate. 3. Because, the defendant, having drawn the agreement, and acted under it, is concluded from making the objection, that it was illegal.

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Other objections have been made to the plaintiff's right to maintain this action, besides the one on which the nonsuit was granted: 1. That the action, being founded on a joint retainer, by *Teller* and the plaintiff, the suit ought to have been brought by them jointly. 2. *That the plaintiff, under the agreement, was entitled to a conveyance of a portion of the land recovered, and is not entitled to any portion of the money received on the sale of the lands; and, 3. That the plaintiff ought to have proved notice to the defendant, to retain the proportion of the money he claims. As these objections were not made at the trial, and as it is possible, had they been made then, that they might have been answered and refuted, by evidence in the power of the plaintiff, I shall dismiss them from any further consideration, on the present motion.

Champerty and maintenance are distinct offences. Champerty is one species of maintenance; but the statute, and elementary writers, regard it as a different offence, although subject to some of the same rules. The first section of the statute (1 N. R. L. 172. sess. 24. ch. 87.) (a) enacts, "that no officer, or other person, shall take upon him any business, that is or may be in suit in any court, for to have part of the thing in plea or demand; and no person, upon any such agreement, shall give up his right to another; and every such conveyance or agreement shall be void; and every person, who shall maintain any plea or suit, in any court, for lands, tenements, or other things, for to have part or profit thereof, shall be punished by fine and imprisonment; but this act shall not prohibit any person to have counsel of persons duly licensed for that purpose, or to take counsel of his parents and next friends." The *eighth* section of the statute prohibits the buying or selling any pretended right or title to lands, unless the person selling, or his ancestors, or those by whom he claims the same, have been in possession of the same, or of the reversion or remainder, or taken the rents and profits for one year next before the sale, upon the pain of forfeiting the value of the lands, and subjecting the buyer, knowing the same, to the same forfeiture. The *ninth* section prohibits any person from unlawfully maintaining another, in any matter or cause, in suit or variance, concerning lands, or goods, or debts, &c., upon the pain of forfeiting 250 dollars. These are all the provisions of the statute, having any relation to the question to be decided; and it is only necessary to state the different provisions, to perceive the difference in the offences, *and the different punishments denounced against them. The question, then, arises, whether the agreement between the plaintiff and *H. R. Teller* is within the prohibitions of the statute; and whether it falls within the exceptions. The statutes of *West. 1. ch. 25.* and *West. 2. ch. 49.* related merely to officers; but the *28 Edw. I.* extended to other persons, as well as officers; and our statute is nearly a transcript of the latter, with this addition, that it declares every such agreement and conveyance to be void. In *Jackson v. Ketchum*, (8 *Johns. Rep.* 479.) the question was, whether a purchase of land, during the pendency of a suit for the recovery

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(a) 2 Rev. Stat 691.

of the same land, was an infraction of the statute, and the conveyance void. The court decided, that such a purchase was against the statute; and that even a *bona fide* purchase, pending the suit, was within the statute, and would be *champerty*. It was urged, on the part of the plaintiff, that the agreement here is not unlawful, because it does not appear that the lands are held adversely to the title of *H. R. Teller*. The statute does not make an adverse holding the test of illegality. It forbids any one taking upon himself any business, that is or may be in suit, in any court, for to have part of the thing in plea or demand; and it prohibits any one from giving up his right to another, with respect to the thing in plea or demand. But it clearly appears, by the recitals to the agreement, and the whole scope of the contract, that *H. R. Teller* did not possess, and never had possessed the land referred to in the agreement; but that it was to be recovered, if recovered at all, after severe litigation, and with heavy expense. The agreement recites, that *Isaac Teller* was possessed of the lands, in his life-time; that *H. R. Teller* was his heir at law, and laid claim to them, and that suits were to be instituted for the recovery of a part or the whole of them. From all this, the inference is irresistible, that *H. R. Teller* never was in possession of any of these lands, and that his right consisted of a claim to them, founded on his father's possession; and that they were possessed in such a manner, that he was driven to his remedy by suits at law; thus refuting and repelling any idea, that they were held in subserviency to his title or claim. The plaintiff, by becoming a party to the *agreement, is concluded as to the facts recited and admitted; and the facts, taken collectively, leave no doubt, that *H. R. Teller's* claim was founded in a right of action merely. This, then, is a case within the very terms, spirit and intent of the first section of the statute. The plaintiff, by stipulating to contribute one half of all the expenses that might accrue, in the prosecution of the suits to be instituted by *Teller*, for the recovery of the property, if the suits should prove unfortunate, did take upon himself business, that was to be put in suit, for to have part of the thing in plea or demand; and the statute declares every such agreement to be void. If the agreement between the parties did not speak the truth, with respect to *Teller's* claim to the land, and if it could have been shown, that the possessions of the tenants or holders of the lands, were not adverse to *Teller's* claim, when the motion for a nonsuit was made, the plaintiff was bound to show the fact, that the possessions were not hostile to that claim. This was not offered to be done. The plaintiff rested his right of recovery on the validity of the agreement; and I then thought, and continue to think, that the agreement, unexplained, was susceptible of but one construction; and that it was a case manifestly within the statute.

To take the case out of the operation of the statute, it was contended, on the argument, that the plaintiff's wife, as the sister of *H. R. Teller*, and as one of the children of *Isaac Teller*, had such an equitable interest in the land, as to render it lawful for her husband to make the agreement. It was decided in this court, in *Wickham v. Conklin*, (3 Johns. Rep. 227.) that where a party had

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any interest, legal or equitable, in the land which was the subject of the suit, there was no foundation for the charge of maintenance. In that case, which was a suit for the penalty inflicted by the 9th section of the statute for unlawful maintenance of a suit, *Conklin* had a resulting trust in the land in controversy, and had, therefore, a right to assist in the prosecution of the suit. Here, the only right which the plaintiff had, grew out of the very agreement prohibited by the statute. His wife had neither a legal nor equitable interest in the land, of which a court of law or equity could take notice, or enforce. *The descent of property, on the death of its owner, is matter of positive regulation, by the municipal laws of the country where it is situated; and when such laws have ordained, that where a person dies seised of land, it shall descend to his eldest son, in exclusion of his sister, no court can notice the claim of the sister, to have part of the inheritance, as an equitable claim, against the express and positive provision of the law, which totally excludes her. When, therefore, it is said, in such a case, that the sister has an equitable claim, it is only the undefined and vague opinion of individuals, that the law is wrong, and that the sister ought to be admitted to an equal participation with the brother, of the property of the ancestor. The recital to the agreement admits that *H. R. Teller* was the heir at law of his father *Isaac Teller*, and as such laid claim to the property which was the subject of the agreement; and it admits, that the plaintiff, though he had married the sister of the heir at law, was not legally entitled to any part of the property, though it states, that in consequence of that marriage, he was justly entitled to a portion of it; but I am clearly of opinion, that the notion of the parties, in this respect, does not authorize them to contravene the statute, by stipulating to carry on the suits to be instituted, at their joint expense, and for the ultimate division of the property among them, if the suits terminated successfully. But it has been insisted, that this case comes within the exception of the statute, and the adjudged cases thereon; the words of the exception are: "*But this act shall not prohibit any person to have counsel of persons duly licensed for that purpose, or to take counsel of his parents and next friends.*"

It is laid down by *Hawkins*, (ch. 84. s. 18.) "that no conveyance, or promise thereof, relating to lands in suit, made by a father to his son, or by any ancestor to his heir apparent, is within this statute, since it only gives them the greater encouragement to do what, by nature, they are bound to do." *Coke*, (2 *Inst.* 563, 564.) in commenting on the statute of 28 *Edw. I.*, and upon the exception, and of allowing counsel to be taken of parents and next friends, says, there is a diversity of signification between taking counsel of serjeants at law, and attorneys, and of the *prochein* **amycs*; that if a serjeant, apprentice, or attorney, take a feoffment, hanging the plea, or the like, to maintain the tenant. though it be in lieu of his fee, yet this is champerty, within the purview of the statute; that to take an estate in the land, hanging the writ, for maintenance, is to become a party; but if a father be impleaded, he may infeoff his son, for his assistance, maintenance and comfort; for this is nature's profession. for the son *assistere, manutenerere*,

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et consolari, et e converso, et sic de similibus ; et sic alia est professio legis, et, alia naturæ ; so it is, that the son may, of his own money, and in his own name, give fees to his father's counsel or attorney, without any expectation of repayment, and so may the father to his son's counsel. In like manner, and by the like reason, if the father be demandant in a *precipe*, he may promise and contract with the son, to assure him the land after the recovery, and it is not champerty within the act ; and so of any other ancestor, and his heir apparent. There are *prochein amyes* not only in blood, but in estate also : and, therefore, as the next of blood is a *prochein amy*, in respect to the expectancy of descent, (and yet it may be, it shall never descend to him,) so they that have reversions, or remainders expectant, upon estates in tail, life or lives, are *prochein amyes*, in estate, and are excepted out of this law. With these positions, *Fitzherb. N. B.*, 563. fully agrees. It is, at least, doubtful, whether Lord *Coke* means to say, that the son and heir may take a conveyance, in consideration of aid and assistance in maintaining the suit ; or whether he means only, that the father is not restrained from making provision for his son and heir, notwithstanding the pendency of the suit. I understand him to mean the latter. But it is immaterial whether he means the one or the other ; the exception does not extend to such a case as this. If the plaintiff would take the benefit of this exception, in favor of an heir apparent, it was incumbent on him to show, that his wife was such heir apparent. This does not appear, and is not to be intended. But, again ; what puts at rest this pretence is, that the agreement secures nothing to the sister of *Teller* ; it stipulates, that on the recovery of the whole, or any part of the property, *Teller* should execute to the plaintiff, his heirs and assigns, conveyances for one fourth part * of the property recovered ; thus entirely excluding his wife, and putting the property, when conveyed, under his own dominion and control. Indeed, it is impossible for me to consider this transaction between the plaintiff and *Teller*, in any other light, than a mere colorable pretext, to avoid the effect of the statute.

The defendant is not precluded from making the objection, that the agreement is void. He is chargeable with knowledge of the contents of the agreement ; but he is not a party to it, nor a *particeps criminis*. He took no interest under the agreement, and assumed no responsibility in consequence of it.

It is insisted, that the defendant, having been retained by the plaintiff and *Teller*, is bound to pay the plaintiff his proportion of the money received. No money was received under the joint retainer, but it was received under the compromises made by the defendant with the possessors of the land, under authority derived from *Teller* alone, in virtue of the power he gave to the defendant. It may well be questioned whether the defendant has received any money to which the plaintiff had a legal title, even admitting the agreement to be valid ; but it being void, surely the plaintiff has no foundation to stand on. It is a fundamental rule, that all contracts which have for their object any thing repugnant to the general policy of the law, or contrary to the provisions of a statute, are

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void ; for it is a rule as well in law as equity, *ex turpi contractu actio non oritur*. Thus, in *Whitaker v. Cone*, (2 Johns. Cases 58.) notes had been given, as the consideration for the conveyance of *Susquehannah* lands, under a claim derived from the state of *Connecticut*, but which lands lay within the state of *Pennsylvania* the sale was held to be illegal, and the consideration void, on the ground, that it was buying and selling a pretended title, and was a species of maintenance. Again ; in *Belding v. Pitkin*, (2 Caines's Rep. 147.) the plaintiff, as the agent of the defendant's testator, had sold lands situated as in the last case, and under the same circumstances, upon an agreement that he should have half the proceeds ; and the defendant's testator had received moneys arising from such sale ; it was adjudged that, the contract being illegal, no action was sustainable. *In *Hunt v. Knickerbacker*, (5 Johns. Rep. 327.) the defendant had received tickets in a lottery instituted in *Connecticut*, for the purpose of selling them in this state, in contravention of our statute ; it was held, that no action could be sustained for the tickets, or the money received. The late Chief Justice *Thompson* said, that he believed no case could be found where an action has been sustained, which goes in affirmance of an illegal contract, and where its object is to enforce the performance of an engagement prohibited by law ; and that wherever an action has been sustained against a party, to prevent him from retaining the benefit derived from an unlawful act, the action proceeded in disaffirmance of the contract, and instead of endeavoring to enforce it, presumes it to be void. When it is considered that, in this case, the plaintiff's only title to demand any thing, depends on the validity of the agreement entered into between him and *Teller*, if that agreement be void, he stands without any pretence of right. I have thought it unnecessary to cite more cases, in support of a doctrine deemed so plain and salutary.

We have no concern with the policy of the statute, to prevent and punish champerty and maintenance. It is enough for us, that the law forbids these offences ; and it may well be doubted, whether the cases to which I have referred, allowing a conveyance, pending a suit, from a father to his son and heir, is not an extension of the exception beyond its natural bearing and import. To allow the exception to be extended to collaterals, because, possibly, they may inherit the estate ; and to permit it even to be extended to connections of such collaterals, having no consanguinity or relationship with the party claiming title, would, in my judgment, amount to a virtual repeal of the act. Mr. Justice *Blackstone*, (4 Bl. Com. 134, 135.) speaking of maintenance, says, it is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. Of *champertors* he says, " These pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted *upon by the common law, and were punished by the forfeiture of a third part of their goods, and perpetual infamy." The motion to set aside the nonsuit, and for a new trial, must be denied.

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PLATT, J., concurred.

WOODWORTH, J., (dissenting.) At the trial, the plaintiff was nonsuited, on the ground that the agreement was unlawful and void, and could not be the foundation of an action. On the argument of this case, other grounds were taken, to show that the plaintiff could not recover; but I waive the consideration of them at present, and proceed to examine the question, whether this agreement was unlawful, as being against the provisions of the statute to prevent and punish champerty and maintenance.

This question arises under the first section of the act, (1 N. R. L. 172.) (a) which declares, "that no officer, or other person, shall take upon him any business that is or may be in suit in any court, for to have part of the thing in plea or demand; and no person upon such agreement shall give up his right to another. And every such conveyance and agreement shall be void." The ninth section declares, "that no person shall unlawfully maintain, or cause or procure any unlawful maintenance, in any matter or cause whatsoever, in suit or variance, concerning any lands, tenements, hereditaments, or any goods, chattels, debts, damages or offences, in any court in this state, or before any person who shall have authority to hear or determine concerning the same." These provisions contain the substance of several *English* statutes, which have received a judicial exposition in the courts of that country in various adjudged cases. The decisions under those statutes must be considered as forming a part of the common law, and, consequently, will serve as landmarks to guide us in the application of the statute to the case under consideration. It is true, our act has one provision, more explicit than is found in the *English* statutes; it is declared, "*that every such conveyance and agreement shall be void:*" but these expressions cannot vary the rule of construction, because the words declare no more than the law *would have declared, had this clause been omitted. An agreement expressly prohibited by statute, must necessarily be considered inoperative and void. It will not be seriously urged, that the party is subject to the penalty only, and that the court are bound to consider the contract legal and valid.

The first section relates to champerty; the ninth to maintenance. The latter is defined to be "an officious intermeddling in a suit, that no way belongs to one, or in which the party has no interest, by maintaining or assisting either party with money, or otherwise, to prosecute or defend it;" the former is "a species of maintenance, being a bargain with a plaintiff or defendant to divide the land, or other matter sued for, between them, if they prevail at law." (4 *Black.* 134. 2 *Chitty's Crim. Law*, 115.) Both were offences at the common law, and punishable by fine and imprisonment. In giving a construction, we must consider the nature and extent of the evil intended to be remedied. In the definition of maintenance, it will be seen, that persons who have *any interest* are not included; so, also, if the agreement is founded on the ties of blood, it has been uniformly held, not to come within the purview of the statute.

(a) 2 *Rev Stat.* 691.

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(8 *Johns. Rep.* 484. *Hawk.* 131. ch. 84.) Without resorting to cases, it would seem to be most unreasonable to prohibit kindred from assisting their near relations, or to subject an individual to punishment, who aided in the recovery of property, in which he had an interest, however contingent.

The statutes concerning champerty and maintenance were intended to operate against strangers. The evil intended to be prevented, is well described in 1 *Leon.* 167: "When many thought they had title or right unto any land, they, for the furtherance of their pretended right, conveyed their interest, in some part thereof, to great persons, and with their countenance did oppress the possessors." It is with reference to such cases, that *Blackstone* speaks of the actors as "pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes." These statutes must be construed so as to effect the intention of the legislature, *which may be collected from the cause or necessity of the law; when that is discovered, it ought to be followed, with reason, and discretion, in the construction, although such construction may seem contrary to the letter. (6 *Bac. tit. Stat.* 1. 384.)

The early cases seem to have followed a literal construction, which the good sense of later times has exploded. In *Master v. Miller*, (4 *Term Rep.* 340.) Justice *Buller* observes, "At one time, not only he who laid out money to assist another in his cause, but he that, by his friendship or interest, saved him an expense, which he would otherwise be put to, was held guilty of maintenance; nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpoena, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected. Accordingly, a variety of exceptions were soon made, and amongst others, it was held, that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it." (2 *Roll. Ab.* 115. *Bro. tit. Maintenance*, 7. 14. 17.)

In 1 *Hawk.* B. 1. ch. 84. sec. 19., it is laid down, that a conveyance by a father to his son, or by an ancestor to his heir apparent, is not within the statute, since it only gives them the greater encouragement to do what by nature they are bound to do. (1 *Bac. Ab.* 576.) So, also, the husband may maintain where the land may descend to his wife. (15 *Vin. Ab.* 162. *H.* 3. 1 *Hawk.* B. 1. ch. 83. sec. 20.) A brother of the half blood shall not maintain, because there is not an immediate possibility to inherit between them; but a brother of the whole blood is not within the statute, for he may inherit. (15 *Vin. Ab.* 162. *H.* 9.) On the same ground, to wit, the possibility of inheriting, it is lawful for the husband of a cousin, who may be heir, to maintain in any action; but if the feme dies without issue, it is otherwise. (*Bro. Maintenance*, pl. 18. 15 *Vin. Ab.* 168. *O.* 9.) On the ground of interest, it is not necessary that a party should have a certain legal or equitable interest; it is enough, if it be shown, that there is a bare contingency of such an interest, in the lands in question,

which, possibly, may never come *in esse; and, in such case, one may lawfully maintain another in an action concerning such lands. This doctrine appears to be fully recognized in 2 *Roll.* 117. 1 *Hawk.* B. 1. ch. 83. sec. 13, 14. If the principles laid down in the preceding cases are recognized as sound law, they clearly prove, that the agreement made between the plaintiff and *Teller* is not within the statute; for the plaintiff, having intermarried with the sister of *Teller*, had a contingent interest in the lands sought to be recovered. The extent of such interest is no where made the criterion, by which the lawfulness of the agreement is to be decided. In the present case, the contingency rested on this: had *Teller* died intestate, and without issue, then the plaintiff's wife, by the rules of descent, would inherit as heir to her brother; and, whether the property acquired was real or personal, the plaintiff would thereby obtain a beneficial interest. This ground alone is enough to protect the plaintiff against the operation of the statute, independent of the affinity existing between the parties.

The offence of champerty consists in the unlawful maintenance of a suit, in consideration of a bargain to have part of the thing in dispute. This, according to the doctrine before advanced, must evidently mean the purchase of a part to which a party had not even a contingent right; but here no such purchase was made; the plaintiff had a contingent, or possible interest, in the whole of the lands, depending on the happening of subsequent events, which might, or might not, vest the right. The plaintiff has, then, done no more than to reduce this contingent interest to certainty, by accepting a covenant to convey one fourth, in case of a recovery, which may not have been more than the value of his contingent interest. Be that as it may, he was a purchaser having an interest, and that distinguishes it from a purchase which the statute renders unlawful.

The preceding view of this case seems to dispense with the inquiry, whether there is proof that the lands were held adversely. I will content myself by observing, that if an adverse possession can be presumed, the facts may warrant that presumption; but this is not sufficient. The party who insists that a deed is void, must make out the fact of adverse *possession affirmatively and clearly. An entry adverse to the lawful owner, is not to be presumed, but must appear by proof, and be made out by positive facts, and not by inference or conjecture. (9 *Johns. Rep.* 168. 8 *Johns. Rep.* 227. 3 *Johns. Cases*, 125.) But it is contended, that the agreement contemplated only a conveyance of the property, and, consequently, the action cannot be supported. I do not construe the agreement in this manner; it is true, *Teller* is to convey one fourth of the property recovered; and had an actual recovery and possession of the land been obtained, that was undoubtedly the primary sense of the parties; but it is not to be restricted to this only. The property generally was in view; and whether the fruits of a recovery were the land itself, or the proceeds of the land, they were equally in contemplation. When recovered, the plaintiff became entitled to one fourth. I think this intent may be fairly inferred, when the relative situation of

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the parties is considered. *Teller* was the heir at law; the suits necessarily must be conducted in his name; a long and expensive litigation may have been foreseen and expected; *Teller* had the power of terminating the causes whenever he thought proper, by compromising with the possessors, and accepting an equivalent for a release of his title. When the defendant speaks of the property recovered, I consider it applicable to property generally, whether real or personal; the obvious intent being, that the plaintiff should participate, to the amount of one fourth of the avails; accordingly, we find, after several years of litigation, *Teller* exercised the power with which he was vested, and authorized an extinguishment of his claim. This was carried into effect by the defendant, who had been the attorney of *Teller* and the plaintiff, in the prosecution of the suits. By virtue of a power from *Teller*, he compromised the suits, and received 54,000 dollars, which, for aught that appears, remains in his hands.

The plaintiff claims the one fourth of this money, under the agreement, as the property recovered. I am satisfied the claim is well founded. By a just construction of the instrument, one fourth part of this money was had and received by the defendant to the plaintiff's use; and it being so where alleged that any part has been paid over to *Teller*, *without notice of the plaintiff's claim, the defendant is liable. If the view I have taken be correct, it follows, that the action is well brought in the name of the plaintiff solely, and the objection that *Teller* is not joined, falls to the ground. I am of opinion, that the nonsuit ought to be set aside, and a new trial granted.

Motion denied.

BRADNER and BRADNER *against* DEMICK

Where, to a declaration in *assumpsit*, on a promissory note, the defendant pleaded, that before the note was given, in a conversation between the parties, the plaintiffs, *falsely, fraudulently, and knowingly*, represented themselves to the defendant as the owners of

THIS was an action of *assumpsit* on a promissory note, made by the defendant, April 6, 1816, payable to the plaintiffs, or order, six months after date, for 68 dollars and 5 cents.

The defendant pleaded, 1. *Non-assumpsit*. 2. That before the giving of the note, in a conversation between the parties, the plaintiffs, *falsely, fraudulently, and knowingly*, represented themselves to the defendant as the owners of 400 acres of land in *Junius*, and offered to sell the same to the defendant for 2,000 dollars; and that he, confiding in such representations as true, purchased the land of the plaintiffs for that sum; that the defendant paid 1,000 dollars, and, for securing the residue, executed a bond and mortgage, and the note in question, for the residue; and averring that the plaintiffs were not the owners of the land, nor had any title to the land, nor any authority to convey, &c.

The plaintiffs replied, that "they did not, nor did either of them, at or before making the note, in a conversation between the parties, knowingly, falsely, and fraudulently, represent themselves as the owners of the land," and concluded to the country: *Held*, that the several matters alleged in the plea, constituting one entire defence, and forming one connected proposition, the replication, as it denied the substantial and material allegation in the plea, to wit, the *fraudulent* representations of the plaintiff, was good. on demurrer; for none of the other allegations furnished any defence to the action. (a)

(a) Vid. *The People v. The Washington and Warren Bank*, 6 Cow. Rep. 211

bond and mortgage, and the note on which this suit was brought. That the plaintiffs were not, at the time of making the said representations, or at any time afterwards, owners of the land, nor had they any title, or any authority to sell and convey the same; and that the note was given in part consideration of the purchase money. The plaintiffs replied, that they did not, nor did either of them, at or before making the promissory *note, in a conversation between the plaintiffs and the defendant, *knowingly, falsely, and fraudulently*, represent themselves as the owners of the land, and concluded to the country. To this replication there was a special demurrer; and the causes of demurrer assigned were, 1. That the replication professes to answer the whole subject matter of the plea, when it answers only a part. 2. It is stated in the plea, that the defendant purchased 400 acres, for 2,000 dollars; that he paid 1,000 dollars, and executed his bond and mortgage, and the promissory note, for the remainder; that the note was given in part consideration of the purchase, and that the plaintiffs were not the owners of the land, nor had they any authority to sell and convey; all of which averments are neither traversed, denied, protested against, or confessed and avoided in the replication. 3. That the traverse in the replication is as to facts which, if found by a jury, would not put an end to the suit; whereas every traverse, before tendering an issue to the country, ought to contain such a negation of the averments in the previous pleading as would terminate the action.

Collier, in support of the demurrer, cited 1 *Chitty's Pl.* 573. 1 *Saund.* 28. n. 3. 18 *Johns. Rep.* 28—30. 1 *Chitty's Pl.* 512, 513. 1 *Ventris*, 271. 11 *Johns. Rep.* 16. 13 *Johns. Rep.* 395. 2 *Johns. Rep.* 550. 6 *Johns. Rep.* 110.

M. Hoffman, contra. He cited 1 *Chitty's Pl.* 589. 598. 2 *Saund.* 103. n. 1. 13 *Johns. Rep.* 272. *Doug.* 655. 9 *Johns. Rep.* 126. 14 *Johns. Rep.* 363. 453. 5 *East*, 449. 11 *Johns. Rep.* 50. 395. 12 *Johns. Rep.* 190.

WOODWORTH, J., delivered the opinion of the court. If the plea is double, the plaintiffs cannot object to it on this demurrer. They ought to have demurred specially for that cause. (1 *Chitty's Pl.* 512.) I incline to think, that the several matters alleged in the plea, may be considered constituent parts of the same entire defence, and form one connected proposition. The material fact on which the defendant must rely, to defeat a recovery, is, the fraud which the *plea avers the plaintiffs practised. If the fraud is traversed, then the residue of the plea amounts to nothing more than this; that the defendant purchased the land, and the plaintiffs had no title. All this may be strictly true, and yet the consideration of the note be valid. The fraud alleged, in the representations previous to the purchase, is denied by the replication. It is not averred, that, at the time of purchase, and when the note was given, the plaintiffs *knew they had no title*; for aught that appears, the plaintiffs may have given a quit-claim deed, and the

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defendant accepted it; if so, the want of title is no ground for rescinding the contract. The loss, in that case, falls on the defendant.

The rule is, undoubtedly, well settled, that the replication must answer so much of the plea as it professes to answer; and as, in the present case, it professes to answer the whole substance of the plea, if it fails, in this respect, it is bad. A party may deny any material allegation in his opponent's pleading; but where the allegation is not material, it cannot be traversed. (1 *Chitty's Pl.* 586.) I consider the fraudulent representation of the plaintiffs, as the material allegation contained in the plea, and, therefore, a replication at once denying that fact, is sanctioned by the rules of pleading. (1 *Chitty's Pl.* 592.) The finding on this issue, either way, disposes of the cause; if for the plaintiffs, the plaintiffs are entitled to recover, because all the remaining allegations of the plea, not embraced by this issue, furnish no defence against the action; if found for the defendant, then it appearing, that the contract is tainted with fraud, the defendant must prevail.

We are of opinion, that the demurrer is not well taken, and that the plaintiffs are entitled to judgment, with leave to the defendant to withdraw his demurrer, and abide the issue taken to the plea.

Judgment for the plaintiffs accordingly.

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*CORNELL *against* LAMB.

The acceptance of a bond for rent is not an extinguishment; and it makes no difference whether the rent is reserved by deed or by parol; for rent, issuing out of the realty, is of a higher nature than a simple contract.

A landlord, therefore, who has received a sealed note for rent due on a parol demise, may maintain an action of *assumpsit*, for the use and occupation, on delivering up the note at the trial, to be cancelled. (a)

Distress is a concurrent remedy for rent, and where the landlord has distrained and sold the goods of the tenant, for part of the rent due, he may maintain *assumpsit*, and recover the residue.

IN ERROR, to the Court of Common Pleas of the county of Saratoga. *Lamb* brought an action of *assumpsit* against *Cornell*, in the court below, for the use and occupation of a dwelling-house and lot of land. The defendant pleaded *non-assumpsit*. It was proved, at the trial, in *January*, 1821, that the defendant had occupied the premises for six years, and that the annual rent was 25 dollars. A witness for the defendant testified, that the plaintiff told him, that he had made a settlement with the defendant for the rent and other accounts, and taken his due-bill for 114 dollars; and that, since taking the due-bill, he had distrained upon the defendant's property for the rent included in the due-bill, and also for rent which had accrued since it was given; and had sold the property for *thirty* dollars. The defendant's counsel then insisted, that the plaintiff could not recover, without first producing and cancelling the due-bill; and the court below being of that opinion, the plaintiff's counsel produced the due-bill, under the hand and seal of the defendant, as follows: "Due *Joseph Lamb*, for house rent, 114 dollars, which I promise to pay him, or bearer, on demand, with interest, as witness my hand and seal, the first day of *May*, 1819." At the request of the plaintiff's counsel, the due-bill or note was filed with the clerk, who made

(a) *Sherman v. Ballou*, 8 *Conn. Rep.* 304.

the following endorsement upon it: "*Saratoga Common Pleas, January term, 1821*: A recovery has been had for the amount of the within note, in an action, for the use and occupation, and this note is accordingly cancelled." The defendant's counsel then objected, that the plaintiff was not entitled to a verdict, 1. Because, having settled with the defendant for the rent, and taken the note in writing, for the balance due, he could not abandon the settlement, and recover, in this form of action, the rent included in the note or due-bill. 2. Because, by distraining for the rent due at the time of settlement, and included in the note, he was precluded from maintaining this action; and, 3. Because the plaintiff *could not maintain this action, without having first delivered up, and actually cancelled, the note. It did not appear, that any objection was made, on account of the due-bill, or note, being under seal. The court below overruled these objections; and the defendant's counsel tendered a bill of exceptions to their opinion. The jury found a verdict for the plaintiff, for 109 dollars, being the balance of the note, and of 25 dollars, for one year's rent, since accrued, and before the commencement of the suit, after deducting the 30 dollars collected by distress.

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Vielie, for the plaintiff in error, contended, 1. That the right of action, for use and occupation, was merged in the settlement. (1 *Bac. Abr.* 281. tit. *Assumpsit*, G. 2 *Mod.* 43, 44. *Buller's N. P.* 129. 4 *Bos. & Pull.* 104. 12 *Mod.* 7.) If *assumpsit* would lie, it should have been on an *insimul computassent*.

2. Taking a sealed note, for the simple contract debt, was a merger of the simple contract. (1 *Chitty's Pl.* 96.)

3. The plaintiff, afterwards, proceeded by distress, and sold the goods of the defendant for the rent; and having thus made his election of a remedy of a higher nature, by distress, it was a waiver or merger of his right of action, for use and occupation, whether the distress produced enough to satisfy his demand, or not. (*Comyn's Dig.* tit. *Election*, C. 2. tit. *Annuity*, C. 1. *Co. Litt.* s. 219. 144. a. 145. b.)

Cowen, contra, insisted, that, as no objection had been made before the court below, as to the note being sealed, the objection could not be raised here, for the first time, that it operated as an extinguishment of the original debt. The plaintiff produced and cancelled the note at the trial, and all objection, on the ground of the note being sealed, was waived. (5 *Johns. Rep.* 467. 8 *Johns. Rep.* 507. 8 *East*, 273. 14 *Johns. Rep.* 404. 3 *Johns. Rep.* 558.) But rent savors of the *realty*, and though reserved by parol, it ranks as a debt of as high a nature as a specialty. It was not, therefore, merged in the sealed note. (1 *Vernon*, 490. 12 *Mod.* 7. 288. 1 *Comyn's Rep.* 67. **Wentw. Office of Exec.* 146. *Toller's Executor*, 218. 221. 3 *Swinb.* 835, note.)

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WOODWORTH, J., delivered the opinion of the court. It is well settled, as a general rule, that an acceptance by a creditor of a higher security than he had before, is an extinguishment of the

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first debt; as where a bond, or other security under seal, has been accepted in satisfaction of a simple contract: but the acceptance of a bond for rent is no extinguishment, because the rent issuing out of the realty, is of as high a nature; though a judgment obtained on the bond would extinguish the demand. (3 *Bac. Ab.* 107. tit. *Extinguishment*, D. 1 *Chitty's Pl.* 96.) This general doctrine will not be questioned; but it may be contended, that it is applicable only to cases where the rent is reserved by deed, and cannot affect this case. That no such distinction exists, is apparent from the reason of the rule; it has no reference to the form of the contract that may have been made, but is founded exclusively on this, that rent issues out of the realty, and is therefore considered a debt of a higher nature than a simple contract. Upon full examination, I am satisfied this principle is sound; and has been recognized whenever it has been drawn in question. It makes no difference whether rent is secured by a parol lease or by indenture, as to the light in which the debt is viewed.

In *Newport v. Godfrey*, (3 *Lev.* 267. 4 *Mod.* 45.) the action was debt for rent, on a parol lease for three years, against the defendant, the executor of the lessee, who pleaded an obligation entered into by the testator, and that he had not assets sufficient to satisfy the debt due by the obligation; the plaintiff demurred. The question was, whether rent due on a parol lease, the term being ended, was payable before a debt by obligation. The counsel for the defendant did not controvert the general principle, but contended, that the term being ended, the arrears were merely personal. Judgment was rendered for the plaintiff in the Court of C. B., who held that the contract remained in the realty, though the term was determined. The judgment of affirmance is reported in 12 *Mod.* 7. under the title of *Godfrey v. Newton*, where it was held by all the judges, that the rent *savored of the realty, and is in equal degree with debt on a bond, and, therefore, the bond is not to be preferred to it.

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In *Gage v. Acton*, (*Comyn's Rep.* 67.) one question was, whether an administrator could plead a retainer, for a debt due to himself on a bond, to an action of debt for rent; it was held that he might, for the debts are of equal degree. The court declared the case of *Godfrey v. Newport* to be good law, which seems to have been decided on the ground, that an executor cannot plead a bond made by the testator, and not satisfied, to an action for rent; for being of equal degree, one cannot be a bar to the other.

In the case in *Comyn's Rep.* the court held, that there was no difference between rent due upon a lease by parol and a lease by indenture; for in both cases, the rent is of the same quality, and that one may be retained against a debt due on bond, as well as the other. The same doctrine was laid down in *Stonehouse v. Ilford*; (1 *Comyn's Rep.* 145.) and in 3 *Bac. Abr.* 82, these cases are cited with approbation. So, also, in *Willet v. Earle*, (1 *Vernon's Rep.* 490.) the point was, whether an executor who had paid the arrears of rent reserved upon a parol lease, had well administered, so as to bar the plaintiffs, who were bond creditors. The court was of opinion, that the rent, though upon a parol lease

partook of the realty, and was, therefore, to be preferred to debts upon bond. If such be the law, of which I have no doubt, it disposes of the present cause; for it appears that the plaintiff rented the house and lot, at the yearly rent of twenty-five dollars; and admitting it was a parol demise, the action for rent was not merged, by taking a specialty for the amount due, but they stand in equal degree. The plaintiff below had his election to pursue his remedy on either. The doctrine of *merger* does not apply. The form of action is *assumpsit*; but being for the recovery of rent, although reserved by parol, it is, for the reason given in the adjudged cases, of as high a nature as an instrument under seal. This view of the subject renders it unnecessary to inquire, whether the defendant in the court below, by not distinctly making this objection, can now be permitted to urge it as cause for a reversal. If there is no difficulty in the *way of a recovery arising from the effect of a seal, neither is there any on the ground of a settlement, and taking a note for the balance due. There is no proof that the plaintiff below accepted the note in satisfaction, and thereby waived his original demand.

The second and third points may be dismissed in few words. If the plaintiff below had a right to distrain, it was a concurrent remedy; it did not affect the right to maintain an action, unless thereby payment or satisfaction had been obtained. The property distrained was sold for thirty dollars; to that amount it was a valid set-off, but it had no other or greater effect. The due-bill was effectually cancelled by the endorsement made on it, by order of the court. The evidence of cancelling was inseparable from the note, and rendered it a dead letter. It must be considered as having been done, by the assent of the plaintiff; for, unless he had assented, the court would not have sustained his action; his election to put his right to recover on the ground of use and occupation, was an abandonment of the note, and evidence of his assent to its being cancelled. The court are of opinion, that none of the exceptions were well taken, and that the judgment of the court below ought to be affirmed.

Judgment affirmed.

JACKSON, *ex dem.* TOTTEN, against ASPELL.

THIS was an action of ejectment for land in *Warwick*, tried at the *Orange* circuit, in *April*, 1822, before Mr. Justice Yates.

The plaintiff's lessor, *Sally Totten*, claimed title to the premises as heir at law to her father, *Silas T.*, deceased. The seisin of *Silas Totten* of the premises, his death, and *that the lessor was his only child, were proved by the plaintiff.

The defendant offered to prove, that *Elizabeth Totten*, the widow of *Silas Totten*, being indebted to the estate of *S. Totten*, her deceased husband, assumed to pay the same; and that, as such widow,

of a purchaser of the widow's right of dower, has the dower admeasured, and assigned to him, the proceeding is *coram non judice*, and confers no title, under the statute, even though the heir, or his guardian, consented to it. (a)

(a) *Cox v. Jagger*, 2 Cow. Rep. 638. *Van Rensselaer v. Sheriff of Onondaga*, 1 Id. 143.

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The right to dower, until it is duly admeasured and assigned, cannot be aliened, so as

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to enable the grantee to maintain an action for it, in his own name. And if a surrogate, at the instance

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she was entitled to dower in the lands of *S. Totten*, and being so indebted and entitled to dower, she intermarried with *Joseph Sayre*; that proceedings were had against *Sayre* after such marriage, as an absent and absconding debtor, and that, under and by virtue of such proceedings, her right of dower in the premises was sold and conveyed for the life of *E. Totten*, (Mrs. *Sayre*,) by the trustees of the creditors of *J. Sayre*, to the defendant, as the right of dower of *Elizabeth Totten*, (Mrs. *Sayre*,) for payment of the debt so due as aforesaid; and that *E. Totten* (Mrs. *Sayre*) had, from the death of *S. Totten*, to the time of the sale, occupied the premises, being a farm, and was living at the time of the trial. The defendant offered to prove, that after the sale and conveyance to him, he applied to the surrogate of *Orange* county, under the act of 26th of *January*, 1807, for admeasurement of the dower; and that, pursuant to such application, the premises in question were admeasured and set off to the defendant, as the right of dower of the said *E. Totten*, then *E. Sayre*, and that such application was made with the consent of *James Wood*, guardian of the lessor of the plaintiff, who was then an infant, which consent appeared by the record of proceedings. All this testimony was rejected by the judge, who directed a verdict for the plaintiff, which was, accordingly, found by the jury.

The case was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. When dower has been duly admeasured and assigned, the widow acquires a vested estate for life, and can maintain an action of ejectment to recover the possession. (*Jackson, ex dem. Miller, v. Hixson*, 17 *Johns. Rep.* 123.)

The right to dower, until it is legally and duly assigned, is a right resting in action only, and it cannot be so aliened, so as to enable the grantee to bring an action in his own *name. A *feme covert*, or a widow, may release her claim of dower, so as to bar herself, but she can invest no other person with the right to maintain an action for it, until it has been assigned. (*Jackson v. Vanderheyden*, 17 *Johns. Rep.* 168.) *Cruise* (*Dig.* vol. 1. p. 159. s. 2.) and *Gilbert* (*Tenures*, 26.) fully agree with this doctrine. It is laid down by them, that the widow has no estate in the land until assignment, for the law casts the freehold on the heir, immediately on the death of the ancestor.

The question, then, arises, whether the dower in this case has been well assigned. It was not assigned when the trustees sold, and they had nothing to sell but a right of action, which was personal, as regards the widow. The third section of the act (1 *N. R. L.* 60.) (a) provides, that if the widow shall neglect, or refuse to demand her dower, for forty days after the death of her husband, that then it shall be lawful for the surrogate of the county where the land lies, upon the petition of the heirs, guardians of minor children, or other proprietors or owners, to issue an order to three disinterested freeholders of the county, to be by him appointed, to admeasure and lay off one third of the land as the widow's dower. The defendant was not a proprietor or owner of the land, within

(a) 1 *Rev. Stat.* 740.

the purview of the statute ; he claimed to be the owner of the right of dower only, not of the lands out of which the dower was to be assigned : and we have seen, that the widow herself had no estate in the land before the assignment, and, therefore, the defendant could have none. The proceedings, then, before the surrogate, were *coram non judice*, for no one applied for admeasurement, having a right under the statute to make such application. The consent of the guardian of the lessor, that the defendant might make such application, is unavailing ; for it could give no jurisdiction, where none existed before. The evidence offered by the defendant was properly overruled, and the motion for a new trial must be denied.

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Motion denied.

*COVELL against WESTON and others, Heirs of WESTON.

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THIS was an action of *assumpsit* against four defendants, two of whom were returned, not found. The declaration, which was filed in *May* term, 1821, stated, that *Stephen Weston*, of whom the defendants are heirs, in his life-time, to wit, on the 29th of *October*, 1808, at, &c., made a certain instrument in writing, &c., to the plaintiff, and thereby promised to pay to the plaintiff 200 dollars, in neat stock, without interest, if the title to a certain tract of land in *Junius*, being 100 acres in the north-east corner of lot No. 41. in *Junius*, should fail ; the said sum to be paid when the title should fail, and for which the said *Stephen W.* admitted he had received a full compensation. The plaintiff averred, that the title to the land mentioned did fail, on the 22d of *November*, 1819, of which the defendants had notice, &c. By reason whereof, and by force of the law in such case made and provided, the defendants, as heirs of *S. W.*, became liable to pay, &c., and, in consideration of such liability, &c., promised the plaintiff to pay to him the said sum of 200 dollars, &c. The declaration also contained counts for money paid ; and money lent, to the ancestor of the defendants, and money had and received to the use of the plaintiff.

Though a matter of defence arising after the commencement of the suit, cannot be pleaded in bar of the action generally ; yet it may be pleaded in bar of the further maintenance of the suit ; and a judgment recovered since the action was brought, may be pleaded by executors in bar of the action.

Heirs being liable to creditors of their ancestor, in respect to lands descended to them, no alienation by them, after suit brought, can protect them, or the purchaser. But where the land is sold, by

The two defendants, who were impleaded with the others, pleaded, 1. *Non-assumpsit*. 2. That the plaintiff ought not further to have and maintain his action, &c., because, on the 1st of *January*, 1815, the said *Stephen Weston* died intestate, in the state of *Ohio*, and his estate was, afterwards, *found indebted to divers persons in a large sum of money, to wit, in the sum of 2,223 dollars and 79 cents ; that after the death of *Stephen Weston*, to wit, on

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order of a court of probates, or surrogate, on the application

of the executor or administrator, for want of sufficient personal assets, under the statute ; (sess. 36. ch. 79. s. 23, 24, 25. 1 N. R. L. 444—451.) (a) such sale being declared valid and effectual against the heirs and devisees, and all persons claiming by, from, or under them, is, also, valid and conclusive against a creditor who had brought his action against the heirs, and may be pleaded in bar of the action. Such creditor, by bringing his action against the heirs, does not acquire a *lien* upon the land descended to them ; his *lien* is merely on the heirs, in respect to the land, so that they cannot aliene it after the action brought, and defeat his claim. The heir of an intestate takes the land of his ancestor, subject to the right of the administrator, to apply to a court of probates, or surrogate, for the sale of it, in order to pay debts ; and when the power given by the statute, to the court of probates, for that purpose, has been executed, the title of the heir is gone, and he has nothing by descent. (b)

(a) 2 Rev. Stat. 100.

(b) Vid. *Jackson v. Robinson*, 4 *Wendell's Rep.* 436. *Van Deusen v. Brower*, 6 *Cow. Rep.* 50.

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the 11th of *February*, 1818, letters of administration were issued by the Court of Probates of this state, to *Polly Weston*; and that, in pursuance of the statute in such case made and provided, *P. W.* proceeded to administer upon the estate, and expended and paid out the whole of the goods and chattels, credits and effects, of *Stephen W.*, at the time of his death, in her hands to be administered, leaving still due from the estate a large sum of money, to wit, the sum of 1,937 dollars and 88 cents; that, afterwards, to wit, on the 4th of *September*, 1821, at a Court of Probates, in pursuance of the act in such case made and provided, (setting out the proceedings,) it was ordered and adjudged by that court, that the whole of the estate of *Stephen W.*, consisting of a farm in the town of *Pompey*, (describing it,) should be sold to pay the debts due from the intestate's estate; that *P. W.*, the administratrix, in pursuance of such order, afterwards, on the 5th of *November*, 1821, sold at public auction all the real estate of the intestate, to *Charles Wailis*, the highest bidder, for 602 dollars, which sale was, afterwards, on the 20th of *December*, 1821, confirmed by the Court of Probates, and the administratrix directed to convey the estate, on payment of the purchase-money; and the defendants averred, that the purchase-money was paid on the 19th of *January*, 1822, into the Court of Probates, according to the act, and that the administratrix executed a deed of conveyance to the purchaser; and the defendants averred, that no lands or tenements, other than the premises so sold by the administratrix, ever came to them, or either of them, by descent from *Stephen Weston*, with a verification. To this plea there was a general demurrer, and joinder in demurrer.

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L. F. Stevens, in support of the demurrer, contended, 1. That the plea showed the certainty of assets descended, when the suit was commenced, and when the lien of the plaintiff became perfect. The statute (1 *N. R. L.* 316. sess. 36. ch. 93.) (a) gives every creditor, whether by simple contract or specialty, an action against the heirs of the *debtor; and the second section declares, that in all cases where any heir is liable to pay the debt of his ancestor, in regard of any lands, &c., descending to him, shall aliene the same before suit brought, such heir shall be answerable for such debt, to the value of the land so aliened; in which case, all creditors shall be preferred, as in actions against executors and administrators. The creditor who first commences his suit acquires a *lien*, which has relation to the issuing of the writ, and must be first satisfied by the heirs. (*Bac. Abr.* tit. *Heirs*, *F. Co. Litt.* 102. *Carthew.* 245.) The purchaser at public auction must look to see if there is a lien. (18 *Johns. Rep.* 441.)

2. The heirs cannot avail themselves of a sale by the administratrix; for they ought to have appeared before the Court of Probates and objected to the sale.

3. The plea is insufficient, and bad in law.

Cady, contra. The act relative to the Court of Probates

(a) 2 *Rev. Stat.* 452.

&c., (sess. 36. ch. 79. s. 23, 24, 25, 26. 1 N. R. L. 444--450, 451.) (a) declares that all sales of real estate, made by order of the Court of Probates, or surrogate, and the conveyances for the same, shall be valid and effectual against the heirs and devisees of the testator or intestate, and all claiming by, from, and under them. From the time administration is granted, the power of alienation by the heir is suspended. It is said, that a commencement of a suit against the heirs, creates a lien on the estate descended, which cannot be impaired. Suppose a judgment and a sale, would not the judgment creditor claim by, from, or under the heir? Again; the act (s. 23.) requires all persons interested, pursuant to public notice given for that purpose, to appear before the Court of Probates, or surrogate, to show cause against the sale. Now, if the plaintiff, by commencing his suit, acquired a lien on the estate, he had an interest in it, and it was his duty to have appeared before the Court of Probates, alleged his interest, and showed cause. If the court had decided against him, he would have his remedy by *appeal*, which is given by the statute. The *British* statutes are not applicable to a case like the present. In the cases referred to by the plaintiff's counsel, *the lien, if any, by action, is where the suit is commenced by original writ, and the judgment under the statute is general, and destroys any lien. Again; this is a contest between creditors, and the statute gives a preference to the first *judgment*, not to the first action; for it says, the preference against the heirs shall be the same as against executors and administrators.

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The administratrix, as a trustee for all the creditors, commenced the proceedings in the Court of Probates, for the purpose of paying all; and the proceeds of the sale were brought into the court as a *fund*, to be distributed equally among all the creditors, *pari passu*. The power of the administratrix commenced from the death of the intestate; and the exercise of that power defeats any action brought by a creditor.

All the lands which descended to the heirs have been sold by the judgment of a court of law, and by virtue of the statute, without any agency of the heirs, who had no power to prevent it.

Again; this suit was commenced against four heirs, two of whom have not been brought into court. All the heirs must be brought into court. (6 *Johns. Rep.* 59.) The statute does not provide for proceeding against one heir, when it appears on the face of the pleadings, that there are more than one.

Again; in the first count, the contract is void for want of a consideration. The note is for *neat stock*, and no breach is alleged; and in the second count, the promises are laid to have been made by the intestate, not by the heirs.

Steevens, in reply, said, that he did not ask for any judgment which could prejudice the heirs, if they had pleaded correctly. The plaintiff seeks only a judgment against the lands of their ancestor, which descended to them. The plea admits that land descended. As to the plaintiff's claim upon that land, it can be

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litigated with the purchaser. The sale, though effectual as against heirs and devisees, and those claiming under them, is not conclusive against the plaintiff.

*Again; the statute (s. 23.) declares, that when any executor or administrator shall discover, or suspect, that the personal estate of such testator or intestate is insufficient to pay his debts, the executor or administrator shall, as soon as conveniently may be, deliver an account of the personal estate and debts to the Court of Probates, or to the surrogate, and request his aid in the premises. Now, nearly four years elapsed after the administration was granted, before any application was made to the Court of Probates, for a sale of the real estate. This was an unreasonable time. As to the objection; that all the heirs are not brought into court, we say, that the heirs are joined within the meaning of the statute. Heirs are debtors by law. (5 Co. 11.) They may be declared against in the *debet et detinet*. If one joint debtor is made to pay the whole, he may call on the others to contribute. The acknowledgment of one joint debtor, of the existence of a debt, so as to take a case out of the statute of limitations, has been held to apply to executors, heirs and devisees. (15 Johns. Rep. 3, 4.)

SPENCER, Ch. J., delivered the opinion of the court. The plaintiffs have taken three objections to the plea; 1st. That it shows the certainty of assets when the suit was commenced, at which time, it is urged, the plaintiff's lien became perfect; 2d. That the heirs cannot avail themselves of a sale by the administrator, because they ought to have appeared before the judge of probates, and objected to a decree; and, 3. That it is bad in law.

If we are to understand, by the first objection, that the plea is bad, because it sets forth the occurrence of events happening after the action brought, but before the plea was put in, there is no foundation for the objection. In *Le Bret v. Papillon*, (4 East's Rep. 502.) the plea was in bar, that the plaintiff was an alien enemy; replication, that, at the time of exhibiting his bill, as well the plaintiff, as the persons then exercising the powers of government in *France*, were at peace and amity with the king of *Great Britain* and his subjects. To this the defendant demurred. The court were of opinion, that the plea was ill pleaded; that it should have been, that the plaintiff ought not *further* to *have and maintain his action, and that no matter of defence arising after action brought, could properly be pleaded in bar to the action *generally*. It was distinctly admitted by the court, that a plea of judgment recovered, by executors, in bar of the action, subsequent to the suit brought, might be pleaded generally in bar; and on the principle, that the judgment of the court need not be in the words of the plea, but that they had the power to give the proper judgment. In that case, they gave judgment, that the plaintiff be barred from further having and maintaining his action. There can be no stronger objection to this plea, which is, that the plaintiff ought not further to have and maintain his action, put in before any other plea had been interposed, than there is to a plea *puis darrein continuance*. Had the defendant pleaded before the proceedings

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before the judge of probates terminated, he might have relinquished such plea, and pleaded as he has now done.

The second objection to the plea is founded on the position, that the plaintiff having acquired a lien on the lands descended, by the commencement of his suit, his lien is not affected by the subsequent sale under the decree of the judge of probates; or, if affected by that proceeding, the defendants are responsible for it, on the ground, that they might successfully have opposed the decree which was made, by showing the commencement and pendency of this suit. At common law, if the heir had *bona fide* aliened the lands which he had by descent, before an action was commenced against him, he might discharge himself, by pleading that he had nothing by descent at the time of suing out the writ, and the obligee had no remedy at law; but now, by the statute of 3 and 4 *W. & M.* ch. 5. s. 5. and by the 2d section of our statute, (1 *N. R. L.* 317.) (a) heirs aliening lands before suit brought, are liable for the value. So that, since the statute, an heir having lands by descent, is liable in respect to such lands, whether he has aliened or not; and in this sense, and no other, has a creditor of the ancestor any lien on the lands descended. An alienation by the heir, after suit brought, cannot protect the heir, or even a purchaser from him. In this case, the heirs have been passive; the lands descended have been conveyed by regular proceedings *before the judge of probates; their title has been defeated, not by their act, but by the act of the law. The statute (1 *N. R. L.* 450, 451.) (b) provides, that when an executor or administrator shall discover, that the personal estate of the testator or intestate, is insufficient to pay the debts of the testator or intestate, he shall apply for the sale of the real estate whereof the testator or intestate died seised; and it declares, that the conveyances for the same shall be valid and effectual against the heirs and devisees, and *all claiming by, from or under them*. What claim has the plaintiff to the land of the intestate? Certainly none which attached on the land in the life-time of the intestate. His claim is upon the heirs, in consequence of the indebtedness of the intestate, in respect to the lands which have descended to them. If, therefore, he has any claim, it is by, from, or under the heirs; and we perceive that the title of the purchaser, under the sale by the decree of the judge of probates, is paramount to any such claim. The error into which the plaintiff's counsel has fallen, is in supposing that the creditor has an actual lien on the land. He has a lien on the heirs, in respect to the land, so that they cannot convey it, after action brought, to defeat his claim; but he has no lien on the land itself. By the laws of *Connecticut*, the real estate of an intestate is liable to be sold for the payment of his debts, where there is a deficiency of personal estate. The administrator has no right to meddle with the real estate by virtue of his general power, but derives this special authority, as with us, from the order of the Court of Probates, which possesses jurisdiction to direct a sale, upon a proper application, and proof of the deficiency of the personal estate. In the case of *Ricard v. Williams*, (7 *Wheat. Rep.* 114.) which came

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(a) 2 *Rev. Stat.* 452.

(b) 2 *Rev. Stat.* 100.

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before the Supreme Court of the *United States*, upon a case from *Connecticut*, in which there had been a sale, under the order of the judge of probates, of real estate, the question was, whether the purchaser under that sale was entitled to claim and hold it against the *bona fide* purchaser of the heir; and the court held, that the power of sale, when ordered, did not convey any estate in the lands to the administrator; that he derived an authority to sell from the court; and that the estate passed to the purchaser, upon his entry into the *land by operation of law, so that he is in under the estate of the intestate, and it was aptly compared to a power given by a will to executors to sell an estate. In such case, the lands descend, and the interest of the heir is liable to be defeated by a sale by the executors. In such a case, if the heir was to be sued for a debt of the ancestor, and prior to the plea the executors should sell, could it be pretended that the heirs have any thing by descent? So, here, the heirs took subject to the right of the administratrix to apply to the Court of Probates to sell the real estate to pay debts, and when that power is executed, and a sale has taken place, the title of the heir is gone, and he has nothing by descent.

Nor could the heirs have made any successful opposition before the Court of Probates. They could have shown that they were sued for a debt of the intestate; but the answer would have been, that the event had happened when the lands could be sold for the payment of al. the creditors, *pari passu*.

This view of the case renders it unnecessary to consider the objections made by the defendant's counsel, to the regularity of proceeding against a part of the heirs only, and to the sufficiency of the declaration. The plea itself may not be formal, but the demurrer is general, and no objections have been taken to the plea.

Judgment for the defendants.

BUCKLEY against PACKARD and others.

The plaintiff,
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a merchant in New-York, consigned goods to the master of a vessel bound to the Havana, for sale: The master, on his arrival at Havana, delivered the goods to the defendants, commission merchants there, for sale: Held, that the master having no authority to pledge the goods for his own account, the defendants, by receiving the goods, with knowledge that they belonged to the plaintiff, became substituted, as factors or agents, in place of the master, and were accountable for the proceeds to the plaintiff; and could not retain them for any advances made by them to the master, or for a balance of an account arising from transactions between them and the master.

THIS was an action of *assumpsit*, to recover the amount of merchandise shipped by the plaintiff to *Havanna*, and *there received and sold by the defendants, partners, under the firm of *Packard & Gowen*, on commission. The cause was tried at the *New-York* Sittings, in *June*, 1821. On the 16th *June*, 1817, the plaintiff, at *New-York*, shipped on board of the brig *Mary*, *Francis Smith* master, bound to *Havanna*, five bales of merchandise, consigned to the master, for sale. On the arrival of the goods at *Havanna*, they were placed in the hands of the defendants, as commission merchants, to be sold. After the goods were so received, the defendants, on the 9th *August*, 1817, shipped on board of the brig *Mary*, a quantity of sugars, amounting to 2568 dollars and 75 cents, for account of the plaintiff, and consigned to the master; and on the arrival of

the vessel at *New-York*, the sugars were delivered to the plaintiff. On the 21st *October*, 1817, the plaintiff shipped two bales of cloths on board of the same vessel, bound for the *Havanna*, consigned to the same master, for sale; and who, on his arrival at *Havanna*, delivered the goods to the defendants, to be sold. On the 12th *December*, 1817, the defendants wrote to the plaintiff, mentioning that Captain *Smith* had placed the cloths of the plaintiff in their hands for sale, but that they could not then be sold without a great loss, and requesting instructions. The plaintiff, in his answer, dated the 7th *March*, referred it to the judgment of the defendants, as to the best time for selling the cloths. Several letters passed between the parties on the subject; and on the 21st *December*, 1818, the defendants informed the plaintiff, that they had sold his cloths, and that the account of sales should be made up and rendered to him by the next vessel. On the 4th *February*, 1819, the defendants wrote to the plaintiff, saying, that they enclosed the account of sales of the cloths and cassimeres, per the brig *Mary*, nett proceeds, 3231 dollars and six eighths, and 1447 dollars and three eighths to credit of the account of the deceased Captain *Smith*. "Having received the goods from him, and charged him with all the advances made, as well as many other articles, which are blended in his accounts, it becomes impossible for us to pay over proceeds of any one article to other persons than his executors, to whom you will apply for any balance that may be due you." That they did not know who administered to his estate, nor to whom they were to pay over the amount appearing to his credit in account, about 900 dollars. It was admitted, that *Smith*, the master of the brig *Mary*, died the 10th *February*, 1818, at *Norwich*, in *Connecticut*, insolvent. Soon after his death, the defendants sent their account against him, to his administrator, and claimed a balance of 3780 dollars; that about three months afterwards, *Gowen*, one of the defendants, called in person on the administrator, and demanded payment; the administrator objected, that he understood that the defendants had a large amount of property on hand belonging to Captain *Smith*, of which they had rendered no account; to which *Gowen* replied, that the defendants had a large amount of goods left in their hands by *Smith*, not belonging to him, but to other persons; and that this could not vary the balance against *Smith's* estate, as they must account to the owners of the property for it, and not to the representatives of *Smith*.

The jury found a verdict for the plaintiff, for 2464 dollars and 47 cents, (being the balance, including interest, between the nett amount of the sales of the goods delivered to the defendants, and of the sugars received by the plaintiff,) subject to the opinion of the court, on a case containing the facts above stated. It was agreed, that if the court should be of opinion that the plaintiff was not entitled to recover such amount, but should consider that he was entitled to recover the balance of 920 dollars, admitted by the defendants in their account with Captain *Smith*, then the verdict was to be reduced accordingly, with interest on

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that amount, from the 31st *December*, 1818. But should the court be of opinion that the plaintiff was not entitled to recover either of those sums, then a verdict was to be entered in favor of the defendants.

Ely and *M Coun*, for the plaintiff, made the following points:

1. That *Smith*, the master, to whom the plaintiff had consigned his goods for sale, could only delegate his power for the purpose of a sale, for the account of the plaintiff.

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2. That, as the factor or agent of the plaintiff, he could not pledge the goods for advances on his own account, or *as security for any debt owing from him to the defendants. (*Guy v. Oakly*, 13 *Johns. Rep.* 332.)

3. That the defendants did not receive the goods in pledge, but as factors of the plaintiff, to be sold on his account; and they were recognized and adopted by him, as his agents, in the place of *Smith*.

4. The defendants acquired no lien upon the goods, or the proceeds thereof, except for advances made by them to the plaintiff; and had no right to apply the proceeds to the payment of their demand against *Smith*. (*Martin v. Coles*, 1 *Maule & Selwyn*, 140. *Shipley v. Kymer*, 1 *Maule & Selw.* 484. 2 *Maule & Selw.* 298. 301. note. *Post v. Kimberly*, 9 *Johns. Rep.* 476. 505, 506.)

5. But if the defendants ever had any lien, for any debt due them from *Smith*, they, by their subsequent conduct, waived that lien. (*Walker v. Birch*, 6 *Term Rep.* 258. *Maber v. Massias*, 2 *Bl. Rep.* 1072. *Weymouth v. Boyer*, 1 *Vesey*, jun. 416.)

H. & R. Sedgwick, contra, contended, 1. That from the course of dealing between the defendants and *Smith*, the consignee and factor of the plaintiff, of which the plaintiff was informed, at the commencement of the transactions between them, the defendants had a right to keep their accounts exclusively with *Smith*.

2. That the plaintiff was, therefore, not entitled to recover at all; but, if any thing, it could be no more than the balance due from them, the defendants, to the estate of *Smith*, being 920 dollars.

They cited *Drinkwater v. Goodwin*, *Cowp.* 251. *Patterson v. Grandesequi*, 15 *East*, 62. *Ex parte Hartop*, 12 *Vesey*, 352

WOODWORTH, J., delivered the opinion of the court.

The goods were shipped and consigned to *Smith*, for the purpose of sale, at *Havanna*. The act of the agent is binding on the principal, so far as it is within the scope of his authority. Not being able to effect a sale, *Smith* delivered the goods to the defendants to sell, and here his authority ceased; for, after such delivery, the defendants became agents and factors *of the plaintiff, with notice that the goods belonged to him. This is manifest, by their sending the sugars, on the return of the brig, for the account of the plaintiff, as well as by their subsequent communications. *Smith* could not pledge the goods for his own debt

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already accrued, nor for advances on his own account. He could only sell for the plaintiff. After delivery to the defendants, they were substituted in his place. A factor has no authority to pledge, whether the person to whom he pledges has or has not a knowledge of his being factor. *Smith* had authority to sell, and, in that situation, he put the goods into the hands of the defendants, as brokers, to sell; and so far he had authority. If the defendants had made advances to *Smith*, on the goods, before the sale, they subjected themselves to all risks. The defendants, who cannot have a better title than *Smith*, had no right to retain the goods, or the proceeds of them, in respect of their advances. These principles are fully recognized in *Martin v. Coles*, (1 *Maule & Selw.* 140.) The present is a much stronger case for the plaintiff, for the defendants *knew* that he was the owner of the goods, and treated with him as such. So, also, in *Shipley v. Kymer* and others, (1 *Maule & Selw.* 484.) the plaintiffs shipped sugars under a bill of lading, which expressed that they were on account of the plaintiffs, and to be delivered to their agent in *London*, who endorsed the bill of lading to the defendants, and drew bills on them for the amount, which the defendants accepted and paid; and, afterwards, having sold the sugars, they carried the amount of the proceeds to the credit of the agent, who, after the sale, had become bankrupt; it was held, that the plaintiffs were entitled to recover the proceeds of such sale from the defendants. The principles applicable to the present case are, also, recognized in 2 *Maule & Selw.* 298. 301. and 9 *Johns. Rep.* 476.

But admitting, on general principles of law, that the defendants would have a lien, it seems to me they did not intend to insist on it. The correspondence between the parties, the various instructions from the plaintiff, as to the sale, and the manner of remitting the proceeds, and the promise to render to the plaintiff an account of sales, satisfactorily show, that the defendants considered themselves accountable to the plaintiff, *and not to *Smith*. The application by the defendants, to the administrator of *Smith* for payment, does not, I admit, divest the lien, if any existed; but it is strong evidence to show that the defendants did not rely on a lien, but considered themselves answerable to the owners of the goods. This application was made a considerable time after the 24th *February*, 1819, when the defendants first apprized the plaintiff that the proceeds were placed to the credit of *Smith*. The plaintiff also applied to the administrator for payment. The defendants refused to pay, and referred him to *Smith's* estate. Such application was no waiver of the claim against the defendants; it is an *immaterial circumstance*. If the plaintiff could obtain satisfaction from *Smith's* estate, it would supersede the necessity of compelling the defendants to do him justice; but the administrator refused, and insisted that he had no claim against *Smith*. It appears in evidence, that the uniform course of the defendants had been to credit *Smith* with the proceeds of goods received from him, without reference to whom they belonged, and the amount of all return shipments was debited to him by the defendants. With this the plaintiff had no concern, nor can his rights

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be affected by the manner in which the defendants transacted their business. It may have conduced to their convenience, or they may have adopted this practice under a mistaken impression that they were accountable to *Smith* only. Whatever may have been the motive, it cannot change the liability incurred, or exonerate the defendants. We are, therefore, of opinion, that judgment must be entered for the plaintiff, for the amount of the verdict.

Judgment for the plaintiff.

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*GATES against LOUNSBURY.

When an act is lawfully done, it cannot be made unlawful *ab initio*; unless by some positive act, incompatible with the exercise of the legal right to do the first act. The mere intention of doing a subsequent illegal act, is not sufficient to render the first act unlawful. (a)

Though a plea of *molliter manus imposuit* may justify a mere assault, it is no answer to a charge of beating, bruising, wounding, and ill treating the plaintiff.

As where, to an action for assaulting, beating, bruising, wounding, and ill treating the plaintiff, the defendant pleaded *molliter manus imposuit* on the

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plaintiff, to prevent him from taking the defendant's horse out of his possession, &c. The plaintiff replied, that the

IN ERROR, to the Common Pleas of *Madison* county. *Gates* brought an action of assault and battery, &c. against *William Lounsbury*, in the court below. The declaration was for an assault and battery, in striking, beating, bruising and wounding the plaintiff.

The defendant pleaded, 1. Not guilty. 2. A special plea in bar, as to the assaulting, beating, bruising, wounding, and ill treating the plaintiff, *actio non*, &c., for that the defendant, before and at the time, when, &c. was the servant of *James Lounsbury*, and had the care of keeping the colts and horses of the said *James*, and that the said *James*, at the time, when, &c., was lawfully possessed of a certain colt or horse, and that the plaintiff, just before the said time, when, &c., to wit, on, &c., unlawfully, and with force and arms; attempted to take away the said horse or colt; and, thereupon, the defendant then and there requested the plaintiff to desist therefrom, which he refused; whereupon, the defendant, at the request of the said *James*, in defence of the possession of the said horse or colt, quietly laid his hands upon the plaintiff, to prevent him, &c., which are the supposed trespasses in the declaration mentioned; concluding with a verification.

Replication to the second plea, that long before, and at the said time, when, &c. the plaintiff was lawfully possessed of a certain close, situate at, &c. in, &c.; and because the said horse or colt, mentioned before, and at the said time, when, &c., was wrongfully in the said close, eating and depasturing the grass of the plaintiff, there growing, and doing damage to the plaintiff, he, the plaintiff, at the said time, when, &c. seized the said horse or colt, in the said close, so doing damage, as a distress for the said damage, and was then and there leading the said horse or colt out of the said close towards a certain pound in the aforesaid town of, &c., with intent to impound or keep the said horse or colt as a distress, to obtain satisfaction for the damage done by him, as

the horse was wrongfully in his close, *damage feasant*, and he was leading him out of the close, towards a certain pound, with intent to impound him, as a distress, &c., as he lawfully might do; and thereupon the defendant, *de son tort*, committed the trespass, &c. The defendant rejoined, that the plaintiff was leading the horse towards the pound, with intent there to impound him as a distress, before he had made application to the seignior viewers of the town, to ascertain and appraise the damages, &c., as by the statute he was required to do, whereupon the plaintiff was a trespasser, *ab initio*, &c.: Held, that the rejoinder was bad, on demurrer.

(a) Vid. *Allen v. Crofoot*, 5 *Wendell's Rep.* 506.

aforesaid, and thereupon the defendant, at the said time, when, &c., of his own wrong, committed the said several trespasses, in manner and form as the plaintiff hath declared; concluding with a prayer of judgment.

Rejoinder. That after taking the said horse or colt, as aforesaid, by the plaintiff, he, the plaintiff, was leading or driving away the said horse or colt, towards a certain pound, in the said town of, &c., *with intent there to impound him as a distress, before he had made application to the fence-viewers of said town to ascertain and appraise the damages, &c.*, as by the act relative to the duties and privileges of towns, he was required to do; whereupon the plaintiff was a trespasser from the beginning; concluding with a verification.

To this rejoinder, the plaintiff demurred, and the defendant joined in demurrer. The court below gave judgment, that the rejoinder was good and sufficient, and a general judgment against the plaintiff for costs. On this judgment, a writ of error was brought to this court; and the cause was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court

We are of opinion, that the judgment of the court below is erroneous in two respects. The rejoinder attempts to put in issue a fact not triable, the intent of the plaintiff to impound the horse in the pound of the town, or public pound, before application was made to the fence-viewers, to ascertain and appraise the damage. If that intent had actually existed, at the time of taking the horse, it was revocable. The plaintiff had a perfect right to change his intention at any time before the horse was actually placed in the public pound. The taking the horse is admitted by the replication to have been lawful. The illegality of that act depended on the subsequent conduct of the plaintiff, in *putting the horse in a public pound, before the damages were appraised. (10 Johns. Rep. 258.) When an act is legally done, it cannot be made illegal *ab initio*, unless by some positive act, incompatible with the exercise of the legal right to do the first act. (11 Johns. Rep. 241. 14 Johns. Rep. 46.) The mere intention of doing a subsequent illegal act, being, from its very nature, mutable, cannot be substituted for the act.

The plaintiff objects, as he has a right to do, to the defendant's first fault in pleading. The second plea leaves unanswered that part of the declaration which alleges, that the defendant struck, beat, bruised and wounded the plaintiff. It alleges, that the defendant gently laid his hands on the plaintiff, to prevent his taking away the horse. The case of *Gregory and Wife v. Hill*, (8 Term Rep. 299.) and *Collins v. Renison*, (Sayer, 138.) are in point against the plea. In the first case, the court said, it was too plain for argument, that though a plea of *molliter manus imposuit* would justify an assault, it never was considered any answer to a charge of beating, wounding and knocking the party down. The case of *Collins v. Renison* is equally strong. The judgment must be

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reversed, and a *venire de novo* awarded, returnable to the court below.

Judgment reversed.

*LE ROY and others *against* THE MAYOR, ALDERMEN,
AND COMMONALTY OF THE CITY OF NEW-YORK.

This court has a general superintending power to award a *certiorari*, not only to inferior courts, but to persons invested by the legislature with power over the property and rights of others, for the purpose of supervising their proceedings, even in cases where they are authorized finally to hear and determine. (a)

As where the corporation of the city of New-York were authorized by statute, to cause sewers to be made in the city, and to make a just and equitable assessment of the expense thereof, on the owners and occupants of houses and lots intended to

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be benefited thereby; though the commissioners, appointed for the purpose of making such assessment, have a discretion in determining the quantum of benefit which each owner or occupier of a house or lot, within the district, may derive from the common sewer, and

with the exercise of which discretion this court cannot interfere; yet, as to the persons who are to be assessed, which must depend on the sound construction of the law, as applied to the circumstances of the case, the court has power to establish the principle on which the assessment is to be made, and to compel the corporation to act on such principle.

A WRIT of *certiorari* was issued, directed to the mayor, aldermen, and commonalty of the city of New-York, returnable in August term, 1820. The *certiorari* recited, that the corporation of New-York, by virtue of the "Act to reduce the several laws relative to the city of New-York into one statute," passed April 9, 1813, (2 N. R. L. 342—460.) had caused a common sewer to be made in Canal street, in the said city, from Washington street to Collect street, for the purpose of receiving the water from a large and extensive district, or section of the city, (particularly described,) and conveying the same to the Hudson river, and appointed Peter Hawes, Roger Strong and John Targee, to make a just and equitable assessment of the expense thereof, (amounting, with the incidental charges, to about 98,000 dollars,) among the owners and occupiers of all the houses and lots intended to be benefited thereby, in proportion, or as nearly as might be, to the advantage which each should be deemed to acquire. That the commissioners named accordingly proceeded to make the assessment, &c., which they assessed the whole expense of building the sewer on the plaintiffs, the owners and occupiers of houses and lots upon Canal street, and within about four hundred feet thereupon, being a small part of the houses and lots within the district or section of the city from whence the water is to be received into the sewer, to be conveyed by it to the Hudson river; to which assessment, objections, in writing, were made by the plaintiffs; but the assessment had, nevertheless, been confirmed by the corporation, and a collector appointed to collect the sums assessed upon the parties named *therein. That the district or section of the city, from which, by the permanent regulation of the streets and grounds, the water was to run into the sewer, and be conveyed to the river, contained about 500 acres; and the sewer was intended for the use and benefit of all the lots and grounds, to which such permanent system of regulation extended. But the assessment made for building such sewer has been made upon a small part only of the houses and lots, and owners of lots, within such district. That Canal street, in which the sewer was to be built, was intended, laid out, and opened, for the purpose of forming a common outlet and passage way for the water from the said district to the Hudson river; and that street, and the sewer therein, conjointly, form

(a) Vid. *Bouton v. President & Co. Brooklyn*, 2 Wendell's Rep. 395. *Matter of the Mayor, &c. of New-York*, 6 Cow. Rep. 570.

the place of such outlet for the water, and are both necessary to its accomplishment. That the cost and expense of the ground, forming the street for that purpose, was assessed upon and paid by the owners and occupants of all the houses and lots within the district or section; that the sewer was necessarily made of its present dimensions, at a very great and increased expense, for the very purpose of giving to it a sufficient capacity to receive and carry off the vast quantity of water which must collect from the extensive district the sewer was intended to drain. That common sewers have been made under the direction of the corporation, at different times, in other parts of the city, where the regulation of the grounds rendered them necessary, and the uniform rule and practice, in such cases, had been, to assess the expense of building the sewer among the owners and occupants of all the houses and lots from whence the water was received into the sewer. That such assessments have been made by persons appointed by the corporation, who have confirmed such assessments; and that this rule and principle had been applied and acted upon, not only before the assessment in question, but subsequently, in cases which were mentioned, &c. The writ of *certiorari* commanded the corporation to certify and return the assessment made by the persons above named, the objections in writing thereto, and all the proceedings respecting the same, with all the estimates and assessments of the expense of making the sewer, and all acts and proceedings touching *the same, before the corporation, or in their possession, custody, or power, &c.; and all and singular the acts, orders, minutes, reports, process, and proceedings, relating to the forming, laying out, and opening of *Canal street*; and all estimates and assessments of the expense of forming and opening that street, or of acquiring the ground for that purpose; and all minutes, orders, reports, acts, and proceedings, touching the same, before the corporation, or in their possession, custody, or power; together with the maps, profiles, documents, and papers, in their possession, custody, or power, designating and describing the district or part of the city from whence, by the permanent and existing regulation thereof, the water runs and is received into the sewer in *Canal street*, to be conveyed through it to *Hudson river*, with the time when these regulations were adopted and made, and all things required of them by the exigency of the said writ, in the premises, &c., before the justices, &c.

In *August* term, 1820, *Edwards*, in behalf of the corporation, moved to quash or supersede the *certiorari*, on the grounds stated in affidavits, which he read: 1. Because of *laches* in the plaintiffs; the assessment having been confirmed by the common council in *November*, 1819, and no *certiorari* was sued out until *July* following. (6 *Johns. Rep.* 131.) 2. Because a bill had been filed by the plaintiffs in the Court of Chancery for an injunction, which was refused by the chancellor, (see 4 *Johns. Ch. Rep.* 352.) from whose decree an appeal had been entered, which was pending. 3. Because the *certiorari* was irregular, on the face of it, requiring the defendants to return, not only all matters relating to the sewer, but proceedings which took place ten years ago, relative to

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Canal street. 4. Because many of the persons assessed had paid to the amount of about 30,000 dollars. He said, that this was an application to the sound discretion of the court; that a *certiorari* was not a writ of right; but the court might quash the writ, if before them, or supersede it, if it was not returned. (2 *Atk.* 318, 319. *Sayre's Rep.* 156. 4 *Term Rep.* 499. 7 *Mod.* 18. 8 *Mod.* 331. *Viner's Abr.* tit. *Certiorari*, B. C. 5 *Term Rep.* 251.) The corporation were not parties in these proceedings, but judges merely; and as long as the *commissioners* *appointed to make the assessment acted within the scope of their authority, their judgment was final and conclusive. The statute left the matter to the judgment and discretion of the commissioners; and where that discretion had been exercised according to the act, no court of law or equity could properly interfere to overhale their judgment. (1 *Johns. Ch. Rep.* 21. 2 *Comyn's Dig.* 487. *Finch's Rep.* 320. 2 *Atk.* 144.)

S. Jones, and *D. B. Ogden*, for the plaintiffs, to show that this court had a superintending power over these proceedings, and that it ought to be exercised in this case, cited 2 *Caines's Rep.* 179. 15 *Johns. Rep.* 538. 16 *Johns. Rep.* 50. 1 *Lord Raym.* 469. 580. 1 *Salk.* 145. 2 *Term Rep.* 234. 1 *Bac. Abr.* tit. *Certiorari*, B. *Styles's Rep.* 13. 3 *Maule & Selw.* 447. *Callis on Sewers*, 112. 223, 224. 151. 161.

The court denied the motion to quash or supersede the writ, with costs, and ordered a return to be made to it. The corporation, afterwards, made a return to the *certiorari*, but the plaintiffs, not deeming it sufficiently full, applied to the court, on a notice of a motion and affidavits, in *January* term, 1821, for an order upon the defendants to make a new or further return to the writ. This motion was opposed by the counsel for the corporation, who cited 2 *Johns. Cases*, 108. 2 *Caines's Rep.* 106. 2 *Burr.* 1042. 3 *Maule & Selw.* 447.

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VAN NESS, J., delivered the opinion of the court. The objects of this application, as stated in the *notice* of the plaintiffs, are, 1. That the return on file be taken off the file. 2. That the rule entered to assign errors, be vacated for irregularity. 3. For a rule that the defendants make a further return, in the following particulars: (1.) That the defendants set forth, state, and describe the district or section of the city of *New-York*, and the bounds and limits of the said district or section of the said city, from which the water runs, and is received, or, by the permanent or the existing regulation thereof, is to run and be received into the common sewer in *Canal street*, to be conveyed and carried to the river. (2.) That they state the time when such permanent *or existing regulation was adopted or made, and the nature and cause thereof, with the maps, profiles, documents or papers in the possession, custody, power or control of the defendants, designating, describing or showing such said district or part of the said city, or such said regulation. (3.) That they set forth such matters and facts as they have

omitted to return, and which, by the *certiorari*, they are required to return. 4. For the costs of this application. 5. For such other rule or order as the court shall see fit to grant.

Sanford's affidavit, which accompanies the notice, very fully explains the whole case; and the necessity of compelling the defendants to return all the papers, orders, regulations and documents in their power or possession, according to the notice, is most apparent; and so the court thought when they refused, at the last *August* term, to quash the *certiorari*, and ordered a return to be made to it. The whole of the proceedings in relation to *Canal street* appeared to us to be one continued operation, from the original laying out of *Canal street*, building the sewer, and covering it. And it is indispensably necessary, to enable this court to determine or settle a principle upon which an assessment of the expense ought to be made, that we should have before us the whole of the proceedings in the possession of the defendants, from the commencement.

It is to be observed, that the plaintiffs do not ask a return of any matter or fact which rests in the knowledge of the individual members of the common council; but of such matters and facts as are contained in written documents in the possession, power, or control of the defendants, as a corporate body, and which are records, or in the nature of records, of the proceedings of the common council, in relation to *Canal street*.

As to the jurisdiction of this court, in relation to the proceedings in question, I would remark, that that point is not now to be discussed, as we have already disposed of it, in refusing to quash the *certiorari* in *August* term last. We decided, and without hesitation, that this court had a superintending and supervising power in cases of this description; and that the papers then submitted to us, entitled the plaintiffs to a *certiorari*, and to such a return thereto, as *would bring the merits of the question fairly before the court. The whole of the proceedings relative to the original laying out of *Canal street*, and the various acts, orders, regulations, surveys, &c., were then, and now are exhibited; and we certainly considered them material to be returned. Without them, a case was not made out for our interference. These proceedings, in fact, according to the view we then took of the case, formed the basis of the complaint of the plaintiffs, and furnished the principal ground for the interposition of the superintending powers of this court. Upon the merits of the question in dispute between the parties, we did not then, nor do we now, express an opinion. We supposed then, as we still do, that it is a case of which we have undoubted jurisdiction, and that, *prima facie*, enough had been established to direct the proceedings to be brought before us, reserving our opinion upon the merits, when a full and complete return of them shall be made.

The *certiorari* recites, that, in the making of other sewers in the city of *New-York*, a principle of assessment had been adopted and sanctioned by the common council, in conformity with that which the plaintiffs contend ought to have been pursued in this case, and it requires a return of the proceedings in such cases.

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To this, I am inclined to think, the defendants are not bound to make any return. Whether the corporation has adopted a wrong principle of assessment in this case, is not to be determined by their practice, even in former analogous cases, but by the law under which they acted. The rule is justly stated by the defendants' counsel, that nothing is to be returned but what can be legally required to be returned, without reference to the command of the *certiorari*.

We, therefore, direct a rule to be entered, that the defendants make a further return to the *certiorari*, as to the first and second points stated in the notice; and that, in the mean time, the proceedings on the rule for the plaintiffs to assign errors, be stayed, until twenty days after such further return is made. We give no costs of this application. They must abide the final event.

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*The defendants, accordingly, made a further return, which being objected to by the plaintiffs as insufficient, the counsel for both parties, to obviate the necessity of any further application to the court on the subject, agreed to an additional statement, to be annexed to, and taken as part of the return. And in *May* term, 1822, the cause came before the court, on the returns to the *certiorari* and the proceedings thereon, and upon a notice from the plaintiffs to the defendants of an application to the court, that the estimate and assessment of the expense of making the common sewer in *Canal street*, mentioned in the return, be set aside, vacated and annulled, with costs, or that such other order be made, or judgment rendered, by the court in the premises, as justice might require.

The argument of the cause was commenced in *May* term, but, for want of time, was continued to *August* term last.

S. Jones, and *D. B. Ogden*, for the plaintiffs, contended, that the defendants, and the commissioners acting under their direction, had not conformed to the authority and directions of the act, or to the rule of assessment given by it. The 175th section (2 *N. R. L.* 407.) says, they are "to cause estimates of the expense to be made, and a just and equitable assessment thereof among all the owners or occupants of *all the houses and lots intended to be benefited thereby*, in proportion, as nearly as may be, to the *advantage* which each shall be deemed to acquire." They have no arbitrary discretion on the subject. The law is imperative. The only discretion to be exercised by them is in apportioning the amount of the assessment among the persons intended to be benefited by the improvement. This act, in regard to the powers given to the corporation, is very similar to the *English* statutes relative to the *commissioners of sewers*, in regard to whom, it has been decided that they are bound to exercise a *legal* discretion, that is, the exercise of given powers. (*Callis on Sewers*, 112, 113. 145. 223, 224. 3 *Maule & Selw.* 447. 2 *Str.* 11. 47.) Then, who were the persons intended to be benefited by this common sewer? Certainly, *all* those from whose grounds the water is carried off to the river, by means of the sewer. They are persons

*intended by the corporation to be benefited, when they directed the improvement to be made, not those intended by the commissioners.

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Edwards, and *H. Bleeker*, contra, insisted, that the proceedings of the defendants had been, in all respects, in conformity to the act; and that the court had no power to vacate or control the proceedings under it, unless they were irregular or fraudulent. The court cannot take notice of any matter that does not appear in the return to the *certiorari*; nor of any thing which the defendants were not legally bound to return. And if any matters have been improperly returned, or ought not to have been returned, the court will disregard them. (5 *Term Rep.* 341. 6 *Mod.* 90. 4 *Viner's Abr.* 356. pl. 11. 2 *Salk.* 493. 5 *Mod.* 159. 7 *Johns. Rep.* 23. *Cases Temp. Hardw.* 169. 2 *Johns. Cases*, 108.)

The office of a writ of *certiorari* is to remove, or bring up from an inferior jurisdiction, a matter of record, or something in the nature of a record. When it is brought up, this court do not look into the merits of the case, but merely whether it appears on the face of the proceedings, that the inferior tribunal has exceeded its jurisdiction. They do not interfere with the exercise of any power within the acknowledged jurisdiction of the inferior court. If the return is false, the party may have an action for a false return, or an action of trespass. (1 *Comyn's Rep.* 80. *Tidd's Pr.* 455. 3 *Maule & Selwyn*, 447. 2 *Bl. Rep.* 717. *March's Rep.* 196. 2 *Caines's Rep.* 182. 4 *Mod.* 66. 165. 1 *Ch. Cas.* 309. 1 *Vesey*, 58. 1 *Vernon*, 58. 1 *Johns. Ch. Rep.* 21. 1 *Sid.* 296. 3 *Atk.* 673. *Skinner*, 480. 14 *Johns. Rep.* 111, 112. 2 *Vernon*, 390. *Prec. in Ch.* 530. *Bull. N. P.* 75. *Peake's Evid.* 294, 295. 4 *Johns. Ch. Rep.* 352.)

WOODWORTH, J., delivered the opinion of the court.

A return having been made to the *certiorari*, directed to the defendants, application is now made to set aside the assessment of the expense of making a common sewer in *Canal street*, on the ground, that it has not been made in conformity *with the 175th section of the act relating to the city of *New-York*. (2 *N. R. L.* 407.)

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The general-superintending power of the court to award a *certiorari*, not only to inferior courts, but to persons invested by the legislature with power to decide on the property or rights of the citizen, even in cases where they are authorized by statute finally to hear and determine, has been frequently exercised, is considered as well established by the common law, and can only be taken away by express words. (2 *Caines's Rep.* 182. 8 *Term Rep.* 542.) The question of jurisdiction came up, when the defendants moved to quash the *certiorari*. The court then decided, that they had a supervisory power in cases of this description. This power will be exercised when the duty to be performed, and the manner of executing it, is clearly pointed out by law, and there shall appear to have been an essential departure from it. On the application for a further return, we considered it indispensably necessary

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to have before us the whole of the proceedings in the possession of the defendants, to enable the court to settle a principle, upon which an assessment of the expense ought to be made. On examining the return, it does not contain more than a fair compliance with the rule; it is admitted, that the court will only notice what can legally be returned, and will reject extraneous matter.

By the 175th section of the act, the corporation are authorized to cause common sewers to be made, and a just and equitable assessment thereof, among the owners or occupants of all the houses and lots intended to be benefited thereby, in proportion, nearly as may be, to the advantages which each shall be deemed to acquire. In order to determine on what principles the assessment in the present case ought to be made, it is necessary to look into the various regulations of the corporation, in relation to improvements in this part of the city, and notice in what manner the inhabitants of the district, whose waters are carried off, are connected together, in respect to such improvements. It appears that there was an original outlet of the water from the grounds comprising the district in question, from time immemorial, a considerable part of which was along the *present route of the common sewer. Had this part of the city remained unimproved, those who owned property in the lower part of the district, must have submitted to the consequences arising from the flow of water, in its course to the natural outlet, and could not have supported a claim for damages sustained, or for contribution, against the owners of lots lying in the upper or higher parts of the district. The present question arises on a very different state of facts. The city of *New-York*, within a few years past, has extended rapidly; a waste and barren territory has been laid out into streets, which have been paved and drained. Houses have been erected, forming an integral part of the city; the spirit of improvement is progressing; acts of the legislature have been passed, from time to time, to enable the corporation to regulate and conduct the necessary operations incident to such a state of things, and without which, disorder, irregularity, and great public inconvenience, would be the inevitable consequence. Persons owning property, which is to be diverted from its original destination, or applied for the purpose of building up a city, stand in a new relation to each other, arising from new interests, and the necessity of taking a comprehensive view of the whole, in order to legislate wisely and discreetly as to a part. Laws for these purposes are presumed to have been passed with the express or tacit consent of those whose interests may be affected. When improvements are directed, and expenses incurred, which are required by the peculiar situation of a part of a district; and such improvements are essential to protect a part, from injuries growing out of the change from vacant lots to streets and houses, they ought to be considered as, in some measure, beneficial to all, although not equally so. The quantum of benefit rests in the discretion of the assessors, with which the court cannot interfere. Who are to be comprehended in an assessment, depends on the principle on which it is made; that must be determined by a sound construction of the law, applied to the facts. It does not rest in

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the discretion of those who are to execute the law. The superintending power of this court is competent to establish the principle, and compel the inferior authority to be governed by it; leaving to its discretion the manner of levying, *and the amount of contribution, to be exacted from each individual. It is no answer to this view of the subject, to say, that the waters which are now carried off through the present covered common sewer, were as effectually carried off by the open drain that was previously used. To the inhabitants on the high grounds it may not be material in what manner the water is discharged into the river; but when streets are paved, the water descending on the surface, from the high ground, must necessarily expose those in the valley to inconvenience and injury. It being the common right and duty of all, to cause the water to be conveyed through the streets, so as to occasion as little injury as possible to the inhabitants near it, the expense becomes a common charge on all; from this it results, that owners of lots on the high grounds, are benefited by a sewer rendered indispensably necessary to protect the inhabitants on the low grounds. The benefit thereby is, that those on or near *Canal street*, are not incommoded or annoyed by the water. This protection to them, is a discharge of the duty previously existing, and obligatory on the whole district, and, consequently, those owning property in the district, and not included in the assessment, are benefited by the sewer.

It appears that the regulations of the city for carrying the water from this district into the river, through *Canal street*, by making a common sewer, and taking the ground for making *Canal street*, were made prior to 1809; that this street was laid out and opened for the purpose of making a common outlet and passage way for the water, and as a substitute for the original outlet; that the expense and cost of the ground purchased for forming the street, was assessed upon the owners or occupants of all the houses and lots, from whence it was supposed the water was, by the permanent regulation, to run, and be received into the common sewer, as being benefited thereby. There was an open drain, before 1815, through *Canal street*, which was designed merely for a temporary purpose, and continued until the covered sewer in question was made. The whole of the proceeding in relation to *Canal street* appears to be one continued operation, from the original laying out, building the sewer, and covering it.

*The principle of assessment, adopted by the corporation, in purchasing the ground for *Canal street*, I consider as applicable to this case, and ought to have been pursued. It is stated, in the return, that the covered sewer was constructed, as well for carrying off the waters, as for correcting the nuisance, which existed during the time the drain or open sewer remained, and which was caused by it; but that it was not necessary for draining off the water. Admitting that the covered sewer became necessary, in order to correct the nuisance, it would not change the principle of assessment. The permanent regulations respecting this district required the purchase of ground and a common sewer. An open drain was used for several years; it was found materially to affect the health

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and comfort of those whom the water passed, in its passage to the river: to remove this nuisance, the covered sewer was built; the canal was a part of the plan of operations for this section or district, and made for the benefit of all. The whole district were bound to make it as little prejudicial as possible. When found to endanger the health of the inhabitants, it was the duty of all to contribute towards the expense of removing it. The covered sewer was constructed for that purpose. How far the nuisance extended does not appear; its removal may have been beneficial to the whole district; but I do not rest the principle on that ground; it is enough that all were bound to protect, to a reasonable and necessary extent, those who were exposed. When grounds owned by various individuals, become the subject of regulation, in respect to laying out streets, and making improvements, which are considered by the proper authority necessary for carrying into effect the plan adopted for a particular district, as a whole, regard must be had to the rights, privileges and advantages of every part, and all are liable to share in the burthen which may be thrown on a part.

We are clearly of opinion, that, by a just construction of the act, the assessment ought to have been made upon all the owners or occupants of houses and lots included within the district, designated on the map, from whence the water flowed into the sewer; and, consequently, that the assessment made ought to be set aside and vacated.

Rule accordingly.

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*AUSTIN and others *against* BELL, late Sheriff, &c.

Though a debtor, in failing circumstances, may lawfully prefer one creditor, or one set of creditors, to another; and in a deed of assignment of his property, in trust, for creditors named in a schedule, may reserve out of the trust property a certain sum for the support of himself and family, for a limited time, and for paying the

THIS was an action of trespass, *de bonis asportatis*, brought against the defendant, who, as sheriff of *New-York*, levied on, and took away certain goods, under two writs of *fi. fa.* against *Elijah, Joshua* and *Abraham Secor*, in favor of *D. R. Lambert*. The cause was tried at the *New-York* Sittings, in *June*, 1821, before Mr. Chief Justice *Spencer*. The taking and value of the goods were admitted.

The plaintiffs claimed title to the goods in question under an indenture *tripartite*, between *E., J. and A. Secor*, of the first part, the plaintiffs, of the second part, and the creditors of the *Secors*, named in a schedule annexed, who may become parties, of the third part; bearing date the 20th of *July*, 1819, whereby the *Secors*, then merchants, and trading under the firm of *E. Secor & Co.*, assigned to the plaintiffs all their property, either joint or several, real and personal, in possession, reversion or remainder, (their

expenses of suits against the assignor, in relation to the trust, and of endeavoring to procure the discharge of the assignor; yet, if the deed of trust contains a *proviso*, that in case any of the creditors named should not, within the time limited in the deed, which contained a release of the debtor from his debts, become parties to it, the shares or proportions of such creditors, so neglecting or refusing to execute the deed, should be paid by the trustees to the assignor himself, the deed is fraudulent and void, under the statute of frauds. (a)

And a judgment creditor, who had refused to become party to the deed, may, before the time limited for the creditors to come in and execute it, take the property of the debtor, in the possession of the assignees, by execution, and sell the same in satisfaction of his debt.

(a) Vid. *Mackie v. Cairns*, 5 *Cow. Rep.* 547. 570. 578.

wearing apparel and household furniture excepted,) and also the debts and demands due to them, either jointly or severally, and particularly their stock in trade then in their store, No. 180 *Broadway*; upon trust, that the grantees shall sell the estate conveyed, and collect all the debts, and after paying themselves the expenses, and for their services in the execution of the trust, and for services in endeavoring to obtain the discharge of the grantors, or either of them, and also such sums as the grantees may be obliged to pay *E. Secor*, (one of the grantors,) *for the maintenance and support of himself and his family, until the first day of May, 1820, not exceeding the rate of 2,000 dollars per annum*, and which allowance is to cease, after all the creditors, parties of the third part, shall have subscribed these presents, or after the grantors, or *E. Secor*, be discharged, by operation of law, from **all his debts, then that the assignees shall pay to E. Secor 600 dollars, for the purpose of paying off small accounts for family expenses of himself and family, or the like demands against either of the grantors; and then, out of the proceeds of the assigned property, pay all the debts of the grantors specified in the schedule A., marked first, second, third, fourth, fifth and sixth classes, in their respective order; those in the first class to be fully paid, with interest, and so, in the order giving preference according to the classes; provided, that the several creditors should, on or before the 1st of November then next, become parties to the assignment, by executing the same: and upon the further trust, that in case any of the creditors named in the several classes, should not, within the time limited, become parties to the assignment, then the grantees should pay to the grantors, the proportion of such of the creditors who neglect or refuse to execute these presents.* The deed contained, also, a release, to be executed by all the creditors, releasing the grantors from all demands on them, in law or equity. There were other provisions in the deed, which it is not necessary to take notice of here.

It appeared, that *Austin & Andrews*, two of the plaintiffs, sent a clerk to take charge of the store occupied by *E. Secor & Co.*, in *October, 1819*, about three weeks before the levy was made by the defendant; that he was in the store when the levy was made, and that the store had been shut up from the time of the assignment until within three weeks before the levy. That the object of the clerk's going to the store, was to sell the goods which had been assigned, no other goods having been put in the store. The goods assigned, consisting of carpeting, were those levied on by the defendant. The name of "*E. Secor & Co., carpet store,*" which had been painted on the store, had been erased before the levy.

Very few of the creditors executed the assignment, and, among others, *D. R. Lambert* did not execute it.

The defendant gave in evidence two judgments in favor of *David R. Lambert*, against *E. Secor & Co.*, in the Supreme Court, and the executions issued thereon. The first was on a promissory note made by *E. Secor & Co.*, dated **1st of December, 1818*, payable in eight months, for 986 dollars and 24 cents, on which judgment was docketed *October 22d, 1819*. The other was on

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two notes, of a like date, and on money counts. The judgment was docketed *October* 18th, 1819, for 3,913 dollars and 27 cents. The balance on both executions was 4,289 dollars and 69 cents. One execution came to the defendant's hands on the 18th of *October*, and the other on the 22d of *October*, 1819, by virtue of which, the carpeting, formerly belonging to *E. Secor & Co.*, was levied on, in the store before occupied by them.

The plaintiffs proved that they took possession of the goods immediately after the assignment; and also the payment of six notes drawn by *E. Secor & Co.*, and endorsed by *Austin & Andrews* for the said *E. Secor & Co.*, and which, after their failure, *Austin & Andrews* had been compelled to take up, amounting to 22,000 dollars, and also several checks, leaving a balance due *Austin & Andrews*, on the 20th of *July*, 1819, from *E. Secor & Co.*, of 33,881 dollars and 6 cents: and it was admitted, that *E. Secor & Co.* owed *Heard*, (the other plaintiff,) at the time of the execution of the assignment, 8,882 dollars and 42 cents. A verdict was taken for the plaintiffs for 4,289 dollars and 69 cents, subject to the opinion of the court, on a case containing the facts above stated.

S. Ford, for the plaintiffs, contended, that the assignment by the *Secors* to the plaintiffs, was legal and valid. The law permits a debtor to prefer one creditor, or one set of creditors, to another (*Riggs v. Murray*, 2 *Johns. Ch. Rep.* 577. and *S. C. Murray v. Riggs*, 15 *Johns. Rep.* 571—583. *Estwick v. Caillaud*, 5 *Term Rep.* 420. *Jackson v. Lomas*, 4 *Term Rep.* 166.) In *Jackson v. Lomas*, there was a clause in the trust deed, that no creditor should take any part under the deed, who did not sign a release of the assignor; but no objection was made to the deed on that account. In *Riggs v. Murray*, the chancellor says, "A reservation of a part of the interest to himself, (the debtor,) as in *Tarback v. Marbury*, (2 *Vernon*, 510.) and in *Estwick v. Caillaud*, does not destroy the provision, in respect to the *residue, though, if the part unreserved be deficient, the creditors might, perhaps, apply to a court of equity, for the residue." Chief *J. Thompson*, in delivering his opinion, in the Court of Errors, in the same case, (15 *Johns. Rep.* 583. 585. 588, 589.) said, it was a well established principle, both in law and equity, that a failing debtor has a just, legal and moral right, to prefer in payment one creditor, or set of creditors, to another. That a reservation by the assignors of a part of the property assigned in the trust deed, to their own use, for their maintenance and support, formed no objection to the appropriation of the residue.

Again; the possession and legal estate in the property assigned, being in the plaintiffs, the assignees, a residuary interest in the assignors could not be taken and sold under an execution. (*Wicks & Fontaine v. Ferris*, 5 *Johns. Rep.* 335. *Rex, in Aid of Maddock, v. Watson*, 3 *Price's Ex. Rep.* 6.) In the present case, the deed was clearly valid, until the first day of *November*, the time limited for the creditors to come in and sign the deed, until which time there could be no resulting trust. The case of *Hyslop*

v. Clark, (14 Johns. Rep. 458.) which may be cited on the other side, is distinguishable from the present case. In that case, there was an express provision, that if any of the creditors should refuse to sign a discharge, the whole trust was to be void.

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Oakley, contra. The statute for the prevention of frauds (sess. 10. ch. 44. s. 1, 2. 1 N. R. L. 75.) (a) expressly declares, that all deeds and conveyances of goods and chattels, in trust for the use of the person making the same, shall be void, and of no effect. In the deed, in the present case, part of the property is to be held to the use of the assignors. It is a conveyance, then, *pro tanto*, in trust for the use of the grantor, and so within the words of the first section of the statute. A conveyance void in part, by statute, is void in the whole. (*Hyslop v. Clark*, 14 Johns. Rep. 458.)

Again; it is provided, that if any creditor refuses to sign and discharge the assignors, then the assignees are to pay his share to the assignors, not to the other creditors. Another *feature in this assignment is, that no creditor is to be benefited by it, unless he discharges the debtor. This is an attempt to coerce the creditors to release the debts due to them; but the law recognizes no assignment which is not absolute and unconditional. The case of *Hyslop v. Clark*, which was admitted, in *Murray v. Riggs*, in the Court of Errors, to be good law, is directly in point, and decisive of the present case. In the case of *Estwick v. Caillaud*, (5 Term Rep 420. S. C. 2 Anst. Rep. 381.) the assignment was of a part only of the debtor's estate, and the assignor had offered to pay the creditor out of other property. That case shows merely that a debtor may lawfully assign part of his estate, for the benefit of particular creditors, if he has property enough left to pay his other creditors. There was no creditor, in that case, to be defrauded. In *Burd v. Smith*, (4 Dallas, 76.) the assignment was held void, on the ground, that there was a resulting trust, in case of a dissent of any of the creditors, for the benefit of the debtor himself. In *Murray v. Riggs*, the only point to be decided, was, whether a deed, with a power of revocation, was valid. Chief Justice *Thompson* rests his opinion on the validity of the last assignment. The respondents, in that case, were not judgment creditors pursuing their legal remedies; and the assignment might be considered valid, until a judgment creditor appeared, seeking to enforce his legal remedy against the deed, as was the fact in *Hyslop v. Clark*. Here are judgment and execution creditors. In *Pickstock v. Lyster*, (3 Maule & Selw. 371—376.) the court rely on the fact, that there was no stipulation for the benefit of the assignor himself, but all his property was fairly to be distributed among all his creditors.

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Foot, in reply, commented on the cases which had been cited, and insisted, that, according to the doctrine laid down in *Murray v. Riggs*, the assignment in this case was legal and valid.

SPENCER, Ch. J., delivered the opinion of the court. The question here is, whether the assignment by *E. Secor & Co.* is fraudu-

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lent, as regards *Lambert* and the other creditors *who did not become parties to the assignment, by subscribing the same, and who must, therefore, be regarded as disagreeing to it. The grounds on which the assignment is supposed to be legally fraudulent are, that it contains stipulations, reserving such sums as may be necessary to defray the expenses of defending suits at law or equity, against the assignors, in relation to the trust created; and for services in obtaining, or endeavoring to obtain, the discharge of the assignors from all their debts; and also such sums of money as the trustees may be obliged to pay to *E. Secor*, for the support of himself and family, until the first of *May*, 1820, not exceeding the rate of 2000 dollars per annum; and, also, because, with respect to such creditors as should not assent to the assignment, by becoming parties thereto, and executing the same, by the first day of *November*, 1819, that the trustees should pay to the assignors the proportion of such creditors as should neglect or refuse to execute the deed.

The case of *Murray v. Riggs* and others, decided in the Court of Errors, (15 *Johns. Rep.* 571.) bears upon some of the objections made to this assignment. It appears that a majority of the court concurred in the opinion delivered by Chief Justice *Thompson*; and that the decree of the Court of Chancery was reversed, on the ground that the assignment of the 31st of *May*, 1800, was legal and valid. We are bound by that decision, whatever our private opinions may be, as to its accuracy or solidity. In that case, one of the appointments and reservations in the trust deed of the 31st of *May*, 1800, was, that the trustees should pay out of the proceeds of the property assigned, towards the support of the grantors, from the 28th of *March*, 1798, until they should be respectively discharged from their debts, or until one year after they should be discharged by law, a sum not exceeding 2000 dollars a year, for each of the grantors. As to this reservation, the chancellor was of opinion, on the authority of *Estwick v. Caillaud*, (5 *Term Rep.* 420.) that it did not destroy the provision in respect to the residue; and he intimates an opinion, that if the part not reserved was deficient, the creditors might apply to a court of equity for the residue. (2 *Johns. Ch. Rep.* 580.) In this part of the chancellor's opinion, Chief Justice *Thompson* concurred. This, *then, puts an end to the objection made to this assignment, as to a reservation out of the trust property, of a support, for a limited time, for one of the assignors; and it is equally decisive of the other objections, as to the provision for defraying the expenses of suits against the assignors in relation to the trust, and for expenses in endeavoring to obtain their discharge; for they fall within the same reason. I will merely remark, that the case of *Estwick v. Caillaud* was decided on the ground, that although Lord *Abingdon* had not assigned all his property, it appeared that he reserved enough to satisfy the particular creditor, who sought to set aside the assignment, and that the other creditors had, for many years, acquiesced in it.

In the case of *Murray v. Riggs* and others, there was a provision in the assignment of the 31st of *May*, 1800 that the

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assignees should hold the balance of trust property subject to the further order of the assignors, and that the creditors who should not, in one year, accept of the conditions, or who should knowingly embarrass the objects of the assignment, should be forever excluded from any share under the assignment. The only remaining question is, whether the stipulation reserving to the assignors the proportions of such of the creditors as neglected or refused to execute the assignment by the first day of *November*, 1819, renders it fraudulent and void. In this case, *Lambert* sued out his executions, and levied on the property assigned, a few days before the first day of *November*, 1819. The difference between the provision in the deed of the 31st of *May*, 1800, in the case of *Murray v. Riggs*, and the provisions of this deed, is this; in the former case, the creditors who refused, for one year, to accept of the conditions, or who should embarrass the objects of the assignment, were forever excluded from any share; but it was not provided that the shares to which they would have been entitled, by accepting the conditions, should revert or result back to the assignors; but, in this case, instead of throwing the distributive shares of such as refused to execute the assignment, into the general mass, for the benefit of all the creditors, it is expressly reserved to the assignors themselves. In the case of *Murray v. Riggs*, Chief Justice *Thompson* observed "For any thing *that appears, all the creditors of *Robert Murray & Co.* (the grantors) were satisfied with the assignment, and the provision there made for the payment of their debts." He went on to say, "This is an important feature, in which this case is distinguishable from that of *Clark and Hyslop*." In the case of *Hyslop v. Clark and others*, (14 *Johns. Rep.* 453.) the assignment contained a provision, that if any of the creditors should refuse to give the assignors a discharge from their entire debts, then the trust, providing for the payment of the scheduled creditors ratably, should cease and become void, and the trustees were directed not to execute it; and, in that event, the deed further provided, that the trustees should hold the property assigned in trust, in the first place, to pay the debt due to *Robert Hyslop & Co.*, and then to pay the avails of the assigned property to such of the creditors as the assignors should appoint; and upon the further trust, in any event, that the overplus should be paid to the assignors. The case of *Hyslop v. Clark* was decided in *October* term, 1817, and the case of *Murray v. Riggs*, in *February*, 1818. Chief Justice *Thompson* assented to the decision in *Hyslop v. Clark*, and it cannot be admitted, that he intended to overrule that case, by any thing he said in the case of *Murray v. Riggs*. The contrary, in truth, appears, from his distinguishing between the two cases, as has already been mentioned. Mr. Justice *Van Ness*, who delivered the opinion of the court, in *Hyslop v. Clark*, considered that part of the deed which declared the trust void, on the refusal of the creditors to give releases, and which, in that event, directed the avails of the property to be paid to such of the creditors as the assignors should appoint, as an attempt on the part of the debtors to place their property out of the reach of their creditors, and to

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retain the power to give preference to creditors, at some future period. That it was, also, one object to coerce the creditors to acquiesce in the terms offered them, and that, therefore, that part of the assignment was void under the statute of frauds; and that, being void in part, as against the provisions of a statute, it was void *in toto*; and in this opinion the court unanimously concurred. Now, I cannot perceive any material distinction between the case of *Hyslop v. Clark* *and the one before us, unless, indeed, it be that this is a stronger case of legal fraud. In this case, on a refusal by any of the creditors to execute the assignment, their shares in the division of the property assigned were to revert to the assignors. In other words, it was to be at their absolute disposal, to apply to their own use, or to pay to their creditors, as they pleased. This is not only an attempt to coerce creditors, and to place the property beyond their reach on execution, but it is the reservation of property which ought to have been devoted to the payment of their debts, to their own private benefit and use. Without, in the least, impugning the doctrine, that a man in debt has a right to give a preference to creditors, I am bound to say, that a deed which does not fairly devote the property of a person, overwhelmed with debt, to the payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall prescribe, is, in law, fraudulent and void, as against the statute of frauds, being made with intent to delay, hinder, or defraud creditors of their just and legal actions. In *Seaving v. Brinkerhoff*, (5 Johns. Ch. Rep. 329. 332.) this principle is fully adopted and recognized. The case of *Burd v. Smith*, (4 Dallas's Rep. 76.) is expressly in point. In that case, *M^r Clenachan*, being overwhelmed with debt, but having a large property in possession, and many suits depending against him, made an assignment of his property to trustees. One of the trusts was to pay ratably, to such of the creditors as should, in writing, agree to accept the same, within nine months after the date of the assignment, and to pay to *M^r Clenachan* the proportion of all such creditors as should not signify their acceptance, within the specified time, to the intent, that he might therewith compound with and satisfy such creditors. On the ground, among others, that the deed contained a resulting trust to the grantor, thereby placing the dissenting creditors in his power, and that this was a badge of fraud, the majority of the court pronounced the deed to be fraudulent and void.

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The only remaining question is, whether, as the property assigned was levied on before the time limited for the creditors to signify their assent, by executing the deed, the deed was not operative and valid until after the first of *November*; *and if so, then, whether the levy and seizure can be justified. In the case of *Burd v. Smith*, the assigned property was sold by a creditor within the nine months allowed to the creditors to signify their acceptance. Though the objection was taken on the argument, that *M^r Clenachan* had nothing but a contingent interest in the property assigned, yet the court held, that the title of the purchaser under the judgment was good. In the

case of *Hyslop v. Clark*, no time was limited within which the creditors were to assent, and *Clark* had dissented. The attention of the court was not, therefore, pointedly called to the consideration of the question now presented. *Lambert*, by suing *E. Secor & Co.*, and by issuing executions on his judgments, had definitively made his election, and taken his stand, not to come in under the assignment, nor to execute it; therefore, as regards him, he is in the situation of a creditor refusing to execute the assignment, and able to make the objection, as well before as after the first of November, 1819, that it is void. The case of *Wilkes & Fontaine v. Ferris* (5 Johns. Rep. 344.) is referred to, as containing a doctrine that invalidates the lien in this case. The court there say, that *Cheriot* might have a resulting trust, after the purposes for which the assignment was made were satisfied, and that such residuum of interest was not the subject of sale on a *fi. fa.*; but the court had, in the same case, decided that the assignment was valid. Where the assignment itself is void, as against a statute, and where the creditor takes the property on execution, which that assignment intended to convey, he takes no *residuum*, nor equitable interest of the assignors, but he takes property belonging to his debtors, the title of which never passed from them to their assignees. The effect of our opinion will be to give to one of the creditors an entire satisfaction of his debt, while others equally meritorious, may go, either wholly or partially, unpaid. But the law serves those who are vigilant; and the creditor who has first obtained judgment and execution reaps the fruits of his vigilance. The preference which the plaintiffs have lost, and *Lambert* has acquired, may be attributed to the plaintiffs' indiscretion, in assenting to become trustees in a deed, which the policy of the law must condemn.

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Judgment for the defendant.

*ADAMS & BARNUM against FOSTER & LAWRENCE.

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IN ERROR, on *certiorari* to the General Sessions of the Peace of the county of *Franklin*. From the return to the *certiorari*, it appeared, that there was an appeal to the Court of Sessions, from the order of removal, made by two justices of the peace, of the town of *Bangor*, on the 2d of May, 1821, by which they adjudged *Cyrus Potter*, a pauper, to be legally settled in the town of *Dickenson*, and directed any constable, &c. to remove him

After an order for the removal of a pauper from the town of *B.* to the town of *D.*, it was found, that he was too sick to be removed, and he afterwards died in *B.*, so that

the order was not executed; and the town of *B.* had taken no measures under the 16th section of the "act for the relief and settlement of the poor," (sess. 36. ch. 78. 1 N. R. L. 279.) (a) against the town of *D.* to enforce, by warrant, the payment of the expense of maintaining the pauper in his sickness, and of his funeral, though a notice had been given by the overseers of *B.* to the overseers of *D.*, for that purpose: Held, that the overseers of *D.*, not being aggrieved by the order or notice, within the meaning of the act, no appeal would lie to the Sessions.

A father, who has acquired a legal settlement in a town cannot, by any deed, release, or act of emancipation, divest his son, who has not arrived at 21, nor acquired a settlement for himself, of his right of settlement, derived from his father; though the son, since such deed of emancipation, had not resided in his father's family, but had acted, in all things, for himself, and worked entirely for his own benefit

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from *B.* to *D.* At the time of making the order, the pauper was sick and lame, and it was found, that he could not be removed, without injury to his health. On the fourth of *May*, after the order was made, *Adams* and *Barnum*, overseers of the poor of *Bangor*, served on *Foster* and *Lawrence*, overseers of the poor of *Dickenson*, a notice, in writing, of the name and circumstances of the pauper, and requesting them to take care of, relieve and maintain him during his illness, and to provide for his funeral, in case he should die in *Bangor*, pursuant to the provisions of the 16th section of the "act for the relief and settlement of the poor," passed *April* 13, 1813; and also a copy of the order of removal, with an endorsement thereon, signed by the justices and one of the overseers of *B.*, expressing their opinion, that the pauper could not be removed, on account of his health. The pauper was not removed under the order, but *died*, in *July* following, a charge on the town of *Bangor*. A warrant of distress was issued against *Thomas Oakes*, late overseer of the poor of *D.*, and one of the predecessors of *Foster* and *Lawrence*, for neglecting to provide for the pauper, after due notice for that purpose; from which warrant, *Oakes*, * "as late overseer of the poor of *D.*," appealed, on the ground that the pauper's last legal settlement was not in *D.* And, on the 22d of *September*, 1821, *Foster* and *Lawrence*, also, appealed to the Sessions, and both appeals were entered at the *October* sessions, at the same time. The appellees moved to quash the first appeal, on the ground, that the order of removal had never been executed, and the pauper died before the prosecution of the appeal; but the court denied the motion, and the appeals came on to be heard, at the *January* sessions, in 1822. The appellees again moved to quash the appeal, on the ground before stated, but the motion was overruled by the court. On the trial before the Sessions, it was proved, that the town of *D.* formerly included within its limits what now constitutes the present towns of *D.* and *B.* That by an act of the legislature of the 15th of *June*, 1812, the town of *D.* was divided, and a part thereof erected into a new town, by the name of *Bangor*. The pauper was the son of *Andrew Potter*, and was of age, in *September*, 1819. He never acquired any settlement for himself. In 1811, the father, with his family, including the pauper, resided on a farm in the town of *D.*, in that part of it which is now included in the town of *B.* The father was assessed for the farm in 1811, and paid the tax in the winter following, and continued to reside upon the farm, after the division of the town of *D.*, until the winter of 1813, when his wife and children, including the pauper, removed to the town of *D.*, to reside with another son of *Andrew P.*, who continued in the town of *B.*, where he worked the two following years, and was assessed and paid a tax in *B.* in 1815. In the spring of 1816, *Andrew P.*, also, removed to the town of *D.*, where he lived with his family, upon a lot of land, for which he was assessed and paid a tax to the collector of *D.* On the 23d of *July*, 1816, *Andrew P.* executed to his son, the pauper, a deed, by which, in consideration of fifty dollars, he released to him all the right, &c. which he, *A. P.*, had, or might have, to his labor and services, until he should arrive

at the age of twenty-one years, and giving him full power and license to act, in all things, for himself, &c. It was proved, that, at the time this instrument was executed, the son lived with *one *Clark*, who paid the fifty dollars, mentioned in the deed, for him. The son had, for two years before, worked for himself, in different places, and after the execution of the instrument, went into *Vermont*, where he remained for more than two years, when he returned to *D.* and lived with a brother, and worked on a piece of land of his own; but soon after returned to *Vermont*, where he continued until the spring or summer of 1819, when he returned to *D.*, being sick and unable to work. He boarded some weeks with a brother, at *Bangor*, and sometimes with another brother, at *Fort Covington*, until the winter of 1821, when, being in *Bangor*, he, by reason of his sickness and lameness, became chargeable to that town. After the execution of the instrument above mentioned, the pauper never resided with his father, who no longer exercised any control over him; nor did he claim or receive any part of his earnings.

The Court of Sessions quashed the order of removal, and adjudged the overseers of the town of *B.* to pay to the overseers of the town of *D.* 27 dollars and 17 cents, for the costs of the appeal.

On the return of the *certiorari*, *Adams* and *Barnum* assigned for error, that the Court of Sessions allowed *Foster* and *Lawrence* to prosecute and sustain the appeal, after it was admitted, that the order of removal had never been executed, by removing the pauper to the town of *D.*, and after it was admitted, that he died before the commencement of the appeal, when they could not be aggrieved by the order; and because the appeal ought to have been dismissed, on the motions made by the appellees, &c. *Foster* and *Lawrence* joined in error.

The cause was submitted to the court without argument.

WOODWORTH, J., delivered the opinion of the court.

The order of removal was made under *the seventh section of the act*; but it never was carried into effect. As the pauper died, before notice of an appeal, it appears to me the town of *Dickenson* was *not aggrieved*, and, therefore, the order could not be the subject of an appeal. There could be no grievance to the town, to which the order of removal was *made, *until it was executed*. It is evident, that the overseers of *Bangor* intended to abandon the order; for *two days after* it was made, they gave notice under the *sixteenth section of the act*, requiring the overseers of *Dickenson* to provide for the pauper as a sick person, unable to be removed. It is true, they served a copy of the order of removal with the notice, but this was of no avail; the respondents were not bound to take notice of it. If it is considered as *an adjudication*, which the overseers of *Bangor* might adopt, as laying the foundation for a warrant to distrain and sell the goods and chattels of the overseers neglecting to provide for the pauper, still an appeal *was premature*. No steps have been taken by *Bangor* to compel payment, and, *non constat*, that they ever will take any. The town of *Dickenson* has never been aggrieved on this account. Whenever the town

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of *Bangor* takes measures to enforce the payment for expenses incurred, *by warrant*, then an appeal will lie; but not before. Putting the order out of question, it will not be pretended, that an appeal would lie from the notice merely; for, although the statute directs a notice, yet it presupposes an *adjudication*, as to the settlement, to be made before a warrant issues to compel payment. (*Voorhes v. Whipple*, 7 *Johns. Rep.* 94.) On the preceding grounds the appeal ought to have been dismissed.

But admitting the appeal was properly before the court, was the settlement of the pauper in *Bangor*?

The town of *Dickenson* was divided, on the 15th of *June*, 1812; previous to that time, it included the territory, *which constitutes the present towns of Dickenson and Bangor*. *Cyrus Potter*, the pauper, was twenty-one years old in *September*, 1819; he was the son of *Andrew Potter*, and never gained a settlement for himself.

In 1811, the pauper's father resided on a farm in that part of *Dickenson* which is now included in *Bangor*, and was assessed in that year, and paid taxes. After the division of the towns, he continued in *Bangor*, and, in 1815, was assessed, and paid taxes. In 1816, he removed to *Dickenson*, was there assessed, and paid a tax in that year.

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On the 23d of *July*, 1816, *Andrew Potter* executed to the pauper a writing for the consideration of 50 dollars, whereby *he released all claims to his services until the age of twenty-one. At this time, the pauper lived with one *Clark*. He afterwards went to *Vermont*, where he remained upwards of two years; then returned to *Dickenson*, where he remained a few weeks. After this he returned to *Vermont*, and came back in 1819, and boarded with his brother, at *Bangor*, until 1821, when he became chargeable to that town. After the execution of the writing, he never resided with his father, nor returned to his house, except a few times, on a visit, when he remained *a day or two at a time*.

The pauper's father gained a settlement in *Dickenson*, having been *assessed and paid taxes* in that town for two years. *The eleventh section of the poor act*, directing the manner of dividing the poor, and by whom any poor person, who has gained a settlement, and becomes chargeable, shall be supported, *does not affect this question*; for the father did not gain a settlement until after the division of the town of *D*. The instrument relied on as an *emancipation* is a nullity. The father could not, by such an act, divest the right of a *derivative settlement*. The cases in which an emancipation takes place, have been always decided on the circumstances of the son's being *twenty-one, or married, or having gained a settlement in his own right, or, as in the case of a soldier, having contracted a relation which was inconsistent with the idea of his being in a subordinate situation in his father's family*. (3 *Term Rep.* 356. *Rex v. Wilton*, *Burr. S. C.* 270. 1 *Strange*, 438. 831.)

We are, therefore, of opinion, that the pauper was settled in *Dickenson*, and that the order of the Court of Sessions be reversed.

Order of Sessions reversed.

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*BARKER *against* THE PEOPLE.

IN ERROR to the General Sessions of the Peace in the city of *New-York*. From the return to the writ of error, it appeared, that *Jacob Barker*, the plaintiff in error, in *February*, 1822, was indicted at the General Sessions, for sending a challenge to *David Rogers*, to fight a duel. The indictment contained five counts; the four first counts were founded on the act, passed the 5th of *November*, 1816, entitled, "An act to suppress duelling," (sess. 40. ch. 1.) which declares, that if any person shall challenge another to fight a duel, &c., or shall accept a challenge to fight a duel, &c., or shall be the bearer of a challenge, &c., such person shall be deemed guilty of a public offence;" and, being convicted thereof, shall be incapable of holding or being elected to any post of profit, trust or emolument, civil or military, under this state." A *nolle prosequi* was entered on the fifth count. The plaintiff in error was tried on the indictment, at the General Sessions, in *May* last, and convicted. And the court below, thereupon, gave judgment, that "he be incapable of holding, or being elected to any post of profit, trust or emolument, civil or military, under the state of *New-York*."

The act to suppress duelling, passed *November* 5, 1816, (sess. 40. ch. 1.) (a) which declares, that any person convicted of challenging another to fight a duel, &c., "shall be incapable of holding, or being elected to any post of profit, trust, or emolument, civil or military, under this state," is constitutional; and a conviction and judgment of disqualification under it, are, therefore, legal and valid.

The plaintiff in error, in proper person, submitted the following questions; 1. Whether the act under which he was convicted, was not contrary and repugnant to the constitution of the state, then existing. (Sec. 1. 9. 13. 33.)

2. Whether the act was not repugnant to the constitution of the *United States*. (Art. VIII. of the Amendments.)

3. Whether it be not repugnant to the new, or amended constitution of the state; and, if so, abrogated after the last day of *February* last, because relating to the right of suffrage. *Vide Const.* Art. I. sec. 3. Art. II. s. 2. Art. V. s. 2. Art. VII. sec. 1. 13. Art. IX. sec. 1.

4. Whether the power to disfranchise a citizen, and render him ineligible to any office, has ever been granted by the people, except in the case of impeachment.

*5. Whether the qualifications of an elector, and, consequently, of the person to be elected, can be changed or regulated by the legislature; the same being fixed by the constitution.

6. Whether the power to disqualify a citizen is not confined, by the amended constitution, to the case of a conviction for an infamous crime.

7. That the judgment in this case is clearly repugnant to the *sixth* article of the amended constitution, which declares, that "no other oath, declaration or test," than the oath of office, "shall be required as a qualification for any office or public trust." The terms used are not synonymous. The word *test* has a most extensive meaning, and prohibits the establishing of any other rule by which the eligibility of an officer shall be determined, than that de-

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finer by the constitution. Not only *test oaths* are prohibited, but all modes of ascertaining the qualifications of the person elected or appointed, which are not clearly provided by the constitution. The provisions of the amended constitution relate to the *receiver*, as well as the *giver*, of votes.

Talcot, Attorney-General, contra.

SPENCER, Ch. J., delivered the opinion of the court.

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The plaintiff in error contends, that the judgment of the Sessions is erroneous; and that the act on which it is founded, declaring that such disability shall ensue, on a conviction for sending a challenge to fight a duel, is unconstitutional: 1st. As regards the original constitution of this state. 2. As regards the constitution of the *United States*; and, 3d. As regards the amended constitution of this state. The 1st, 9th, 13th and 33d articles of the original constitution of this state, are said to bear upon this question, and the statute is supposed to be in repugnance to the provisions of those articles. The first article forbids the exercise of any authority over the people, but such as shall be derived from or granted by them. The powers of the state legislature are not conferred by any express grant, but result from the institution of a supreme legislature; and it is an axiom, that the legislature possess all power not expressly forbidden *either by the constitution of the state, or the *United States*, which relates to the prevention of crime or the well ordering of society. The ninth article constitutes the assembly judges of their own members. I presume, it is intended by the plaintiff, by referring to that article, to infer, that no other power, not even the legislative, can divest the assembly of this right. If this be so, and it is not necessary to deny it, the only consequence would be, that should the assembly consider the judgment as no disqualification, its operation would be so far defeated, but not, necessarily, any further. The thirteenth article forbids the disfranchisement of any member of this state, unless by the law of the land, or the judgment of his peers. If the duelling act is not otherwise unconstitutional, then the injunctions of this article have been complied with; for the act is the law of the land, and the verdict is the judgment of the plaintiff's peers. The thirty-third article relates to judgments on impeachments, and restrains their operation to removal from office, and disqualification to hold any place of honor, trust or profit, under this state. The application of this article to the question before us, is not perceived. I am, therefore, of opinion, that there is nothing in the original constitution which the act violates. When it was before the council of revision, the objections which some of the council, and I was one of them, had to the act, related to other parts of it, and not to the one now objected to. The supposed repugnancy of the act to the constitution of the *United States*, as it is urged, is to the eighth amendment, which declares, that cruel and unusual punishments shall not be inflicted. The disfranchisement of a citizen is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences

The judgment rendered in the court below, is supposed to be erroneous, as repugnant to, and contravening the third section of the first article, the second section of the second article, the second section of the fifth article, the first and thirteenth sections of the seventh article, and the first section of the ninth article of the amended constitution. The third section of the first article, giving to the senate and assembly *the right to judge of the qualifications of their members, has been commented on, as well as the second section of the fifth article, which relates to judgments on impeachments; and also the first section of the seventh article. The second section of the second article ordains, *that laws may be passed, excluding from the right of suffrage, persons who have been, or may be, convicted of infamous crimes.* The thirteenth section of the seventh article, among other things, ordains, that such acts of the legislature as were then in force, should be, and continue the law of this state, subject to such alterations as the legislature shall make concerning the same; but all such parts of the common law, and *such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated.* The first section of the ninth article ordains, among other things, that those parts of the amended constitution which relate to the right of suffrage; the number of members of assembly thereby directed to be elected; the apportionment of members of assembly; the elections thereby directed to commence on the first *Monday of November, 1822*, should be in force, and take effect from the last day of *February* then next. The sixth article has also been relied on, which ordains, *that no other oath, declaration or test shall be required, as a qualification for any office or public trust than the one prescribed, which is to support the constitutions of the United States and of this state, and faithfully to discharge the duties of the office, according to the best ability of the officer.*

It may admit of much doubt, whether the legislature are not restrained from excluding from the right of suffrage, any other persons than such as have been, or may be, convicted of infamous crimes. The enumeration of offences, on the conviction for which power is given to the legislature, to exclude the persons convicted, by necessary implication, denies the power in any other cases. The offence of which the plaintiff has been convicted, is not an infamous one. The law has settled what crimes are infamous; they are treason, felony, and every species of the *crimen falsi*, such as perjury, conspiracy and barratry. (*Peake's Evid.* 126, 127.) If this be so, then the inquiry is, whether the right of suffrage, *necessarily implies the right of being voted for. The amended constitution does not prescribe the qualifications of members of assembly; and, with respect to senators, it requires only that they shall be freeholders. There are particular qualifications for a governor, but for all other offices the constitution is silent as to qualification. I cannot think, that the right of voting and being voted for are convertible terms; indeed, we see they are not, for a great class of voters are not required to be freeholders, and yet it is necessary to the qualification of a senator or a governor, that he should be a freeholder; and, with respect to the governor, he

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must be a native citizen of the *United States*, thirty years of age, and a resident within the state for five years. The right of suffrage is, therefore, distinct from the right of being eligible to an office.

As to the oath of office, prescribed by the 6th article, and the provision, that no other oath, declaration or test shall be required; it is contended, that the word *test* has a most extensive meaning, and prohibits the establishing any other rule by which the capacity of a person to hold an office shall be determined, than that defined, the oath of the person appointed or elected. I cannot accede to this. In my judgment, the exclusion of any other oath, declaration or test, as a qualification for an office or public trust, means only, that no other oath of office shall be required. It was intended to abolish the oath of allegiance and abjuration, or any political or religious test, as a qualification. The provision, that no other oath is to be required as a test, imports nothing with respect to the other qualifications. In the case of a person elected a senator, or a governor, the oath has no reference to the qualifications required, and they may be inquired into by some other tribunals. If an alien should be elected, he can well take the oath; but surely, the question whether he could hold the office would be open to inquiry.

Upon the whole, it appears to us, that there exists no constitutional objection to the conviction; and the judgment must be affirmed.

Judgment affirmed.

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*DEWEY *against* DERBY, MONTGOMERY, and others.

Where a joint bond is given for the performance of covenants, a *parol* discharge of one of the obligors, without consideration, is not a discharge of the bond, nor can it be given in evidence under the general issue. (a)

THIS was an action of *covenant* on a bond, executed by the defendants, jointly, to the plaintiff, as sheriff, conditioned for the faithful discharge, by *Derby*, of the duties of the office of deputy sheriff and gaoler, &c. The declaration contained specific breaches. The defendants pleaded, 1. *Non est factum*. 2. Negating the breaches assigned. 3. A release and discharge. Under the first plea, they gave notice, that they would give in evidence, at the trial, a release of one of the joint obligors by *parol*, &c. The cause was tried at the *Chataugue* circuit, in *June* last, before Mr. Justice *Platt*. At the trial, the plaintiff proved the execution of the bond, and the breaches assigned. The defendants offered to prove, that previous to the suffering or committing any breach of the condition of the bond, the plaintiff had, by *parol*, released and discharged *James Montgomery*, one of the defendants, and a joint obligor, from all liability on the bond. The plaintiff's counsel objected to the evidence, and it was overruled by the judge. The jury found a verdict for the plaintiff, for 615 dollars and 80 cents.

A motion was made to set aside the verdict, and for a new trial.

(a) Vid. *Clark v. Nillo*, 6 *Wendell's Rep.* 236. *Ransom v. Keyes*, 9 *Cow. Rep.* 123
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A. H. Tracy, for the defendants, made two points: 1. That an instrument, under seal, for the performance of covenants, may, before a breach of the condition, be discharged by parol. (*Fleming v. Gilbert*, 3 *Johns. Rep.* 528. *Lattimore v. Harsen*, 14 *Johns. Rep.* 330. *Ratcliff v. Pemberton*, 1 *Esp. N. P. Rep.* 35. 1 *Roll. Abr.* 453. pl. 5. 1 *Str.* 538. *Doug.* 661.)

2. That a discharge of one joint obligor, discharges all. (*Rowley v. Stoddard*, 7 *Johns. Rep.* 207. *Co. Litt.* 232. a. 2 *Saund.* 48. a. 2 *Salk.* 574. *Hob.* 70. *Cro. Eliz.* 762.)

**A. Dixon*, contra, insisted, 1. That an express release of an instrument under seal, must be by writing under seal. (2 *Saund.* 48, note 1. *Moore's Rep.* 573. 1 *Roll. Rep.* 43. *Co. Litt.* 364. b. 6 *Co.* 44, note a. 2 *Wils.* 376.)

Again; there was no consideration for this discharge; and without a consideration, or a seal, which implies one, it is void. (2 *Johns. Rep.* 448. 13 *Johns. Rep.* 87. 17 *Johns. Rep.* 167.)

2. A release of one joint obligor, does not operate as a release of his co-obligors, unless it be a technical release, or under seal. (*Rowley v. Stoddard*, 7 *Johns. Rep.* 207. 2 *Johns. Rep.* 448.)

WOODWORTH, J., delivered the opinion of the court. The plaintiff declared on a bond, conditioned for the faithful discharge, by *Derby*, of the duties of deputy sheriff.

At the trial, the defendants offered to prove, that previous to a breach of the condition, the plaintiff had, by parol, released and discharged *James Montgomery*, one of the defendants, and a joint obligor in the bond, from all liability on the same; the evidence was rejected, and a verdict taken for the plaintiff.

The first question is, whether a parol discharge exonerated *Montgomery* from liability? and, secondly, if it did, whether the other defendants were thereby discharged?

1. The evidence offered, not making out a technical release, and no consideration or inducement appearing for the parol discharge, it is a *nudum pactum*, and consequently void.

It is evident, that the plaintiff did not intend to discharge all the defendants. The proof offered must be considered as evidence of an agreement not to sue *Montgomery*. If he had been the sole obligor, and such agreement had been made, on a valid consideration, or if there had been an express covenant not to sue, it would operate as a release, to avoid circuitry of action; but where there are several obligors, a covenant not to sue one of them, is not a release of the demand, or a protection to the others; the remedy is on the covenant. (*Harrison v. Wilcox and Close*, 2 *Johns. Rep.* 449.) If this doctrine be correct, it follows, that the evidence was, on this ground, properly overruled. The defendant, who claims the benefit of the agreement, must pursue his remedy in another form. Here is no release by writing under seal, no accord and satisfaction, (for that requires the payment of a sum equal to the debt, otherwise it is no satisfaction, unless by deed,) no consideration whatever, to give effect to the parol agreement; so that, neither in this cause, or any other form of action, can the evidence offered be of any avail.

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The cases which show that the time of performance may be extended by parol, before an agreement is broken, are not analogous; they do not annul the contract, but affirm it. The defence here, if successful, destroys the right of action altogether.

The rule is correctly laid down, in *Seymour v. Minturn*, (13 Johns. Rep. 175.) that where there is an agreement, upon an adequate consideration, to pay a sum certain, the promisor cannot avoid that agreement, by an agreement to receive a less sum. The bond implies a valid consideration. The attempt is to avoid it on a discharge wholly without consideration; this cannot succeed.

The case of *Fleming v. Gilbert* (3 Johns. Rep. 528.) is supposed to bear on this question; but, on examination, it will be found not to contravene the propositions already advanced. It was in that case decided, that the time of the performance of the condition of a bond may be enlarged by parol; and that where certain acts were done by the obligor, amounting to a substantial, though not a literal performance of the condition, evidence of a parol agreement of the obligee, to waive any other performance, was admissible. The ground taken by the court was, that the plaintiff's conduct could be viewed in no other light than as a waiver of a compliance with the condition of the bond; that it was a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned.

The case of *Lattimore and others v. Harsen* (14 Johns. Rep. 330.) is also relied on by the defendants, but will be found to be an authority against them.

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The plaintiffs and defendant entered into an agreement under seal, by which the former agreed to perform certain *work, and bound themselves under a penalty. Some time afterwards, the plaintiffs became dissatisfied with their agreement, and determined to leave off the work. The defendant then released them by parol from the covenant; and promised, if they would go on, to pay them by the day. The action was brought for the work done under this arrangement, and the plaintiffs recovered. The point decided was, that the contract made under the new arrangement was binding on the defendant. The effect of the parol release was not a question necessary to be decided. It is evident the court considered it unavailing, for they observe, "By the former contract, the plaintiffs subjected themselves to a certain penalty, for the non-fulfilment, and if they chose to incur this penalty, they had a right to do so; and notice of such intention was given to the defendant, upon which he entered into the new arrangement."

The preceding view of this case renders it unnecessary to consider the second point raised by the defendants. We are of opinion that the motion to set aside the verdict, and grant a new trial, ought to be denied.

Motion denied

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THIS was an action of *replevin* for a horse, cutter, and harness. The defendant pleaded, 1. *Non cepit*. 2. Avowry and justification of the taking, by virtue of execution issued on a judgment in a justice's court, in favor of *L. F. Steevens* against *John Clark*, the father of the plaintiff; and the defendant, being a constable, averred, that he took the horse, &c. out of the possession of *John Clark*, the defendant in the execution; and that the property and possession of the horse, &c. were in *John Clark* at the time of the taking on the execution; and traversed, that the property or possession was in the plaintiff, &c.

*The plaintiff replied to the avowry, that the property and possession of the horse, &c. were in the plaintiff, and concluded to the country, &c.

The cause was tried at the *Seneca* circuit, in *June*, 1821, before Mr. Justice *Yates*. On the trial it was fully proved, that the horse, &c. were the property of the plaintiff; and that *John Clark*, his father, at his request, went a few miles to *Waterloo*, to transact some business for the plaintiff, who furnished him with the horse, &c. for that purpose; that while *John C.* was at a tavern in *W.*, on the plaintiff's business, the defendant, as constable, by virtue of an execution against him, levied on the horse, &c. The defendant moved for a nonsuit, on the ground, that *replevin* would not lie, as the property was shown to be in the actual possession of *John Clark* at the time; and also because the plaintiff had not proved the fact averred in his replication, on which the issue was joined, that the property and possession were in the plaintiff. The judge overruled the motion, and charged the jury that the plaintiff was entitled to a verdict; and the jury, accordingly, found a verdict for the plaintiff.

Replevin lies at the suit of the owner of a chattel, against a sheriff, constable, or other officer, who has taken it from the owner's servant or agent, while employed in the owner's business, by virtue of an ex-

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ecution against such servant or agent; the actual possession of the property, in such case, being considered as remaining in the owner, and not in the defendant in the execution.
(a)

A motion was made to set aside the verdict, and for a new trial.

L. F. Steevens, for the defendant, contended, that the property being in the actual possession of the defendant in the execution, when it was taken; and, in the custody of the law, could not be replevied. He cited *Thompson v. Button*, 14 *Johns. Rep.* 84. *Gardner v. Campbell*, 15 *Johns. Rep.* 401.

Michael Hoffman, contra, contended, that the evidence given at the trial fully supported the issue. Whether the issue was properly joined or not, was not material; for the same evidence which would maintain the issue in trespass, will support it in *replevin*. The absolute, or general owner of personal property, having the right of immediate possession, may maintain an action for any injury to it, though it never was in his possession: for the rule is, that the property in personal chattels draws to it the possession.

(a) Vid. *M'Ginty v. Herrick*, 5 *Wendell's Rep.* 240. *Dunham v. Wyckoff*, 3 *Ibid.* 280. *Hall v. Tuttle*, 2 *Ibid.* 475. *Marshall v. Davis*, 1 *Ibid.* 109. *Beckman v. Bemis*, 7 *Cow. Rep.* 29.

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(1 *Whitty's Pl.* 48, 49. 2 *Saund.* 47. a. n. 1. *Lotan v. Cross*, 2 *Camp. *N. P. Rep.* 464.) Where the person in actual possession is the mere *servant* of the absolute owner, and having no interest in the property, the general owner must bring the action. The general property being in the plaintiff, and *John C.* being his mere agent or servant, the possession must be considered as in the plaintiff; and the issue, therefore, was supported. *Replevin* lies in all cases where there is an unlawful taking. Suppose a person sends a portrait to a painter to take a copy from it, and it is taken on an execution against the painter, cannot the owner of the portrait bring an action of replevin against the sheriff, or other officer, to recover back his property? Or is he to be told, that he can only bring trespass, or trover, and recover damages?

Steevens, in reply, said, the issue joined was as to the possession as well as the property. The question was not whether trespass would lie, but whether replevin would lie to take goods out of the custody of the law.

PLATT, J. I am of opinion, that *replevin* lies in favor of any person whose goods are taken by a *trespasser*. As to *John Clark*, the goods were *in the custody of the law*, and, therefore, *irreplevisable*; but, in my judgment, the law does not deny the remedy by *replevin*, to any person whose goods are taken from his *actual* or *constructive* possession by a wrong-doer. It is, in many cases, the only certain and efficacious remedy; and, without it, a man's personal chattels would never be safe, unless he keeps them in his own absolute custody. Suppose *John Clark*, in this case, had taken the horse and sleigh, as a trespasser himself, would they be in the *custody of the law*, as to the true owner, because the constable happened to find them in the hands of a person against whom he had an execution? If I leave my watch to be repaired, or my horse to be shod, and it be taken on a *fi. fa.* against the watchmaker, or blacksmith, shall I not have replevin? If the owner put his goods on board a vessel to be transported, shall he not have this remedy, if they are taken on execution against the master of the vessel? It seems to me indispensable, for the due protection of personal property. In many cases, it would be mockery to say to the owner, Bring an action of trespass or trover against the man who has despoiled you. *Insolvency* would be both a *sword* and a *shield* for trespassers. Besides, there are many cases, where the possession of chattels is of more value to the owner, than the estimated value in money; and the action of *detinue* is so slow and uncertain, as a *specific* remedy, that it has become nearly obsolete.

The rule, I believe, is without exception, that wherever *trespass* will lie, the injured party may maintain *replevin*. (*Pangburn v. Patri'ge*, 7 *Johns. Rep.* 140.) Baron Comyns says, "Replevin lies of all goods and chattels unlawfully taken;" (6 *Comyn's Dig. Replevin*, A.) though, (*Replevin*, D.) he says, "Replevin does not lie for goods taken in execution." This last proposition is certainly not true, without important qualifications. It is untrue, as to

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goods "taken in execution," where the *fi. fa.* is against *A.* and the goods are taken from the possession of *B.* By goods "taken in execution," I understand goods *rightfully taken*, in obedience to the writ: but if, through design or mistake, the officer takes goods which are not the property of the defendant in the execution, he is a *trespasser*; and such goods never were "*taken in execution*," in the true sense of the rule laid down by Baron *Comyns*.

Creditors, who have not indemnified the officer, have no right to complain of the delay of a *replevin*; and, as regards the interest of creditors who indemnify, no greater inconvenience can result from the action of *replevin*, than from a suit in *trespass*, against the officer who levies. It may delay the execution, but there are countervailing benefits; for, if the creditor has indemnified the officer against a claim of property in a stranger, the damages will be less, if such claim be established in an action of *replevin*, than in an action of *trespass*; because, in the former mode, the property would be speedily restored to the injured owner, without deterioration or sacrifice; and the creditor would be thereby relieved from his obligation to indemnify, except for mere nominal damages. Whereas, if *trespass* or *trover* be the only remedies, the creditor who indemnifies incurs a risk for the whole value of the property, and its safe keeping, *until the uncertain termination of a tedious lawsuit. As to the officer himself, if he acts *bona fide*, similar considerations would induce him to prefer the remedy of *replevin* to an action of *trespass*; for it relieves him from risk and responsibility.

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The loose *dicta*, and the apparent contradiction and confusion of ideas, in many of the reported cases, on this point, have arisen from the want of precision of language, or the misapplication of the phrase, that "goods cannot be taken from the custody of the law." Sir *Edward Coke* says, "A *replegiare* lyeth where goods are distrained:" (*Co. Litt.* 145. b.) thus giving an *example* for a *definition*; and even the learned and discriminating Sir *William Blackstone* was led into the error, that *replevin* lies "only in one instance of an unlawful taking, that of a wrongful distress." (3 *Black. Com.* 146.) Baron *Gilbert* says, "A *replevin* is a judicial writ to the sheriff, complaining of an unjust taking and detention of goods and chattels." (*Gilb. Replev.* 58.) In *Baker v. Fales*, (16 *Mass. Rep.* 147.) it was held, that *replevin* lies for a wrongful *detention* of goods, although the original taking was justifiable. In *Shannon v. Shannon*, (1 *Sch. & Lefroy*, 321.) Lord *Redesdale* holds, that there must be an *unlawful taking from the possession of the plaintiff*, to maintain *replevin*. But the question is, What is meant by the *possession* in such case? I understand by it, not only the *actual*, but the *constructive* possession of the owner; and, by a *constructive possession*, I mean a right to reduce the chattel to immediate possession. If the plaintiff in *replevin* shows a possession in himself, or his bailiff, the law then casts the *onus probandi* on the defendant, as to property.

In the case of *Thompson v. Button*, (14 *Johns. Rep.* 84.) Chief Justice *Thompson* said, "As a general principle, it is undoubtedly true, that goods taken in execution are in the custody

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of the law; and it would be repugnant to sound principles, to permit them to be taken out of such custody, when an officer has found them in, and taken them out of the possession of the defendant in the execution." But, in that case, the goods were taken while in the possession of the plaintiff in replevin, who was *not defendant* in the execution: *and the general rule, as laid down by the chief justice, had no necessary application to the case.

In the case of *Gardner v. Campbell*, (15 Johns. Rep. 401.) this court recognized the rule as laid down in *Thompson v. Button*, and gave it its proper application; that is, to a case where the *defendant in the execution* brought *replevin* against the officer; and it was held not to lie.

In *Thompson v. Button*, Ch. J. Thompson also remarked, that "the utmost extent to which the case of *Pangburn v. Patridge* can be carried, is to permit *replevin* to lie, where an action of *trespass* might be brought." That is precisely the extent to which I would carry it; and the ancient authorities sanction the doctrine to that extent. (2 Edw. IV. 16. *Danby*, J. *Winch*. 26. *Plowd*. 281.) The general rule is, that the plaintiff in replevin must have a *general* or *special property* in him at the time of the unlawful taking of which he complains; that is, he must have either the *actual possession*, or the *right of reducing it to his actual possession*, at the time of the tortious taking. Sir Edward Coke says, "It is a general rule, that the plaintiff must have the property of the goods in him at the time of the taking. But yet, if the goods of a villeine be distrained, the lord of the villeine shall have a replevy; because the bringing of a replevy amounts to a claim in law, and vests the property in the plaintiff." (*Co. Litt.* 145. b.) Bacon says, "Not only a general property, which every owner has, but also a special property, such as a person has who has goods pledged to him, &c., is sufficient to maintain a replevin; and in such like cases, *either party may bring a replevin*." (*Bac. Abr. tit. Replevin and Avowry*, F. by *Gwillim*.)

In the case now before us, the plaintiff in the replevin had not only a general and absolute *property* in the goods at the time of the seizure, but, in my judgment, he had not even parted with the *actual possession* of them. The testimony of *John Clark*, the only witness on that point, is, "that at the time of the levy and seizure by *Skinner*, he (the witness) came to *Waterloo*, on business for his son, (the plaintiff,) and had the plaintiff's horse, cutter, and harness; and drove *them under a shed, and went to Mr. *Slack's* for boot-binding for his son," (the plaintiff,) and while so under the shed, the defendant seized the horse, &c. on the *fi. fa.* against *John Clark*. There was no lending, nor letting for hire, nor any kind of bailment of the chattels to *John Clark*. He was not only in the use of the plaintiff's property, but he was using it in the business and employment of the plaintiff, at the time of the levy. Suppose a *fi. fa.* against a laborer, who is employed by me to plough my land with my horses; or against a *stage driver* on the highway, can it be contended, that the horses at the plough, or the post-coach on the highway, are not in the *actual possession* of the proprietors? Or, if, intrusting a chattel to a ser-

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vant, to be used in the business and employment of the owner, be, in any sense, a *bailment*, can the doctrine be endured, that it cannot be replevied by the owner, if taken on an execution against the servant, while so using it?

If goods be taken on *fi. fa.* as the property of the defendant named in the execution, and the writ is from a court of competent jurisdiction, and not void for any defect on its face, the officer, as against such defendant, is never a trespasser, nor a wrong-doer. As to such defendant, the property is in the *custody of the law*, and he is concluded by the judgment against him. To allow him to question the validity of the seizure, in an action of *replevin*, would, indeed, be against public policy; for it would be moving in a circle, and the creditor would never receive the fruits of his execution. But such reasoning has no application to the rights of a *stranger*, whose property has been wrongfully taken on an execution against another person.

In *Rex v. Monkhouse*, (2 *Str.* 1184. and note, 3d *Ed.*) the court granted an attachment against the sheriff, for granting a replevin of goods distrained on a conviction of deer-stealing; and "the ground of the decision was, that the conviction was conclusive, and its legality could not be questioned in a replevin." So, in *Win v. Forster*, (*Lutw.* 1191.) *Aylesbury v. Harvey*, (3 *Lev.* 204.) *Rex v. Burchett*, (*Str.* 567.) and in every adjudged case that I have found, where it has been held, that "*goods taken in execution*," or "*goods in the custody of the law*," could *not be replevied, that doctrine has been applied to cases where the *defendant in the execution* was plaintiff in the replevin, and to none other.

I admit that the judgment in this case against *John Clark* is conclusive; and the execution against him cannot be questioned in a replevin *by him*. But where a *stranger* to that judgment and execution brings replevin, it is not to question or overhale those proceedings, but to obtain redress for a *trespass* done to him; the judgment and execution set out in the avowry, are *res inter alios*, and cannot affect his rights, or his remedies.

I am, accordingly, of opinion, that the judge ruled correctly at the trial, and that the plaintiff is entitled to judgment.

SPENCER, Ch. J., and WOODWORTH, J., were also in favor of the plaintiff; but they rested their decision solely on the ground that the chattels were, in this case, to be deemed as taken from the actual possession of the plaintiff, who was not the defendant in the execution.

Judgment for the plaintiff.

WILCOX, *qui tam*, &c., against E. and B. FITCH.

THIS was an action of debt, brought on the *fourth* section of the statute of *frauds*, (sess. 10. ch. 44. 1 *N. R. L.* 75.) (a) to recover 1,283 dollars and 92 cents, being the amount of the con-

(a) 2 *Rev. Stat.* 134.

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The plaintiff, in an action of ejectment, is a creditor within the meaning of

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the statute of
frauds; and
may maintain
an action of
debt under the
fourth section
of the statute,
to recover the
amount of a
bond executed
by the defend-
ant, on which a
judgment was
entered, and
execution is-
sued, with in-
tent to defraud
his creditors.

(a)
A *qui tam*
action on the
fourth section
of the statute of
frauds, which
gives a moiety
of the sum re-
covered to the
people, and the
other moiety
to the party
aggrieved, is
not within the
statute of lim-
itations, and the
suit may, there-
fore, be brought
at any time.

dition of a bond executed on the 10th of *November*, 1817, by *Ebenezer Fitch* to *Bush Fitch*. The declaration, which was of *August* term, 1820, alleged, that the bond was made by *E. F.* to defraud his creditors, contrary to the act, &c.; and that judgment was entered up on *the bond, on the day of its date, and a *fi. fa.* immediately issued on the judgment. That at the time of making such fraudulent bond, the plaintiff had a just and lawful cause of action pending in the Court of C. P. of *Essex* county, against *E. F.*, which he afterwards prosecuted to judgment; and that *E. F.* was, at the time, &c. and now is, indebted to the plaintiff, in the sum of 200 dollars; and that the plaintiff has been delayed, hindered and defrauded, &c.

At the trial, the plaintiff proved the making of the bond by *E. F.*, to his brother *B. F.*, on the 10th of *November*, 1817; that judgment was entered thereon, and execution issued on the same day, by virtue of which, all the real and personal estate of *E. F.* was sold to *B. F.* for 800 dollars. That, shortly before the bond was executed, *E. F.* declared that his property should not be sacrificed, and that he was going to put his property out of his hands, and that he had sent for his brother *B. F.* to assist him; that *B. F.* purchased the property, and *E. F.* lives in the house, and occupies the farm. The plaintiff also gave in evidence a record of a judgment in ejectment in his favor, against *E. F.*, and also of a judgment in an action of trespass for the mesne profits, on which execution was issued, and returned *nulla bona*. It appeared, that the action of ejectment was pending at the time the bond was executed by *E. F.* to *B. F.*

The defendant's counsel moved for a nonsuit, because it appeared, that more than *two* years had elapsed from the time the bond was given to the bringing of this suit; but the judge refused the motion, reserving the question; and the jury found a verdict for the plaintiff, for 1,283 dollars and 92 cents.

A motion was made to set aside the verdict, and for a new trial.

The cause was submitted to the court, on the points stated, without argument.

WOODWORTH, J., delivered the opinion of the court. The objections against the plaintiff's recovery, are, that he was not a creditor when the bond was given, and that the statute of limitations is a bar. As to the first, it appears, that previous to the execution of the bond, the *plaintiff had commenced an action of ejectment against *Ebenezer Fitch*, which was pending on the 10th of *November*, 1817, and judgment was afterwards obtained against the casual ejector; a judgment was also recovered for the mesne profits; an execution was issued thereon, and returned *nulla bona*. The case of *Jackson v. Myers* (18 *Johns. Rep.* 425.) disposes of this objection; it was there held, that a conveyance made with intent to defeat a recovery for damages, in an action pending for a *tort*, and before trial and judgment, was fraudulent and void, within the statute against frauds.

The words of the statute are, "to defraud creditors and others

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(a) Vid. *Seward v. Jackson*, 9 *Conn. Rep.* 405.

of their just and lawful actions, damages and demands." The plaintiff in the ejectment cause was protected by the statute, as fully as if he had been a creditor. He claimed the recovery of possession, and damages for the mesne profits; and the result shows he had a just and lawful action.

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The fourth section of the statute of frauds gives one moiety of the penalty to the people, and the other moiety to the party aggrieved; there is no limitation in this section, as to bringing the action. The suit was commenced in *August*, 1820, more than two, but less than three years after the execution of the bond. The sixth section of the act for the limitation of actions, declares, that all actions for any forfeiture, upon any penal statute, where the forfeiture is limited to *the people of the state only*, shall be brought within two years; that when the penalty is given to *any person who shall prosecute for the same, or to the people, and to any other who shall prosecute*, the action shall be brought by the person who may lawfully pursue for the same, *within one year*; and in default of such pursuit, the same shall be brought for the people *at any time within two years after that year ended*; and that, where the benefit of the forfeiture is given to the party aggrieved, *the action shall be sued within three years*.

Neither of these limitations apply to the case under consideration, for here the penalty is limited, and given to the party aggrieved and the people, in equal portions; no other person is entitled to sue and recover.

*The consequence is, that this case not being within any of the limitations in the statute, the suit is not barred by length of time; since by the common law there was no stated or fixed time as to the bringing of actions. (*The People v. Gilbert*, 18 *Johns. Rep.* 228.)

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We are of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

NORTON against RICH.

WENDELL moved for an attachment for the non-payment of costs, against *Selden* and *Post*, to whom *Norton*, the plaintiff, had assigned a demand against *Rich*, for which a suit had been brought in the name of *N.* against *R.*, and on a report of referees, a judgment was given in favor of *R.* against *N.* for 35 dollars. The affidavits stated that *Norton* was insolvent, and that the costs had been regularly taxed and demanded of the assignees of *N.*, who had refused to pay the bill.

Though costs are not allowed to either party, on a motion to change the venue; yet they abide the event of the suit, and may be taxed after judgment. (a)

L. Mitchell, contra, objected, that the defendant should have applied before the cause was referred, or tried, to stay the proceedings until security was given for the costs. (13 *Johns. Rep.* 330.)

Per Curiam. That is a remedy which the party may have

) Vid. *Gidney v. Spelman*, 6 *Wendell's Rep.* 525. *Jackson v. Van Antwerp*, 1 *Ibid* 295.

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pending the suit; but he is also entitled to an attachment, after a judgment in his favor. The motion must be granted.

Mitchell objected, that items had been taxed in the bill for costs, on making a motion to change the venue in the cause.

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Per Curiam. Although costs are not given on a motion *to change the venue in a cause, yet they abide the event, and the party may have them taxed, when final judgment is signed.

Motion granted.

SUDAM against SWART.

Proceedings in a cause before referees, will be stayed, on an affidavit of the absence of a material witness, who had gone out of the state, but was expected to return by a certain day. (a)

MOTION, on the part of the defendant, to stay the proceedings in this cause, until the first day of *April* next, on an affidavit of the absence of a material witness, who had gone out of the state, and was expected to return home by that time, &c.

It appeared, that the cause had been regularly referred, by an order of the court, in *August* last; and there was a notice of a meeting of the referees, for the 14th of *November* last. The defendant obtained a judge's order to stay the proceedings, until this term.

Sudam, in propria persona, contra.

Per Curiam. The order of the judge in this case stayed the proceedings on the reference, with a view to this motion, which is, that the referees stay proceedings until the first day of *April* next. It is not doubted, that the witness, who is absent, is a material witness, nor but that he will return home by that time. It is objected, that such a rule, as that now asked for, is unprecedented; and that it ought to be left to the discretion of the referees, in the first instance, and that this court ought not to interfere, until it is seen, that the referees will not consent to an adjournment of the hearing. The cases of *Bird v. Sands*, (1 *Johns. Cases*, 394.) and *Combs v. Wyckoff*, (1 *Caines*, 147.) appear to us to be in point, that this court will stay the proceedings before referees, on a proper foundation being laid for the application. Indeed, it is the common practice of the court to do so. The referees may, and probably would, allow an adjournment, until a material witness, who was absent, should return. They might not, however, *think fit to grant it. The application to this court is a cautionary measure, in which we think the party has a right to our aid, in order to prevent an unnecessary accumulation of costs, and to prevent his being compelled to go to a hearing, when he is not prepared, from causes over which he has no control.

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Rule granted.

(a) Vid. *Grahams v. Morton*, 6 *Wendell's Rep.* 552

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ALLAN, Widow, &c., against SMITH.

DOWER, *unde nihil habet*, &c. At the last term, the tenant was called, and not appearing, his default was entered, and a writ of *grand cape* was issued, returnable at this term. A motion was now made to set aside the default, and all subsequent proceedings, and that the tenant have leave to enter his appearance. It appeared from the affidavits, that the tenant, on being served with the summons, consulted a lawyer, who advised him to inform *R.*, of whom he purchased the land; that *R.* being sick, the tenant applied to a lawyer, in presence of the son-in-law of *R.*, to know who was to defend the suit; and was told that *R. Troup*, Esq. would take charge of it. *R.* knew nothing of the default; and *Troup*, in his affidavit, stated, that he understood that he was to defend the suit, but did not know of its situation, until the second day of *November* last, &c. It appeared, that the husband of the demandant had aliened the land in his life-time.

After the default of the tenant for not appearing on the summons, in an action of *dower*, had been regularly entered, and a writ of *grand cape* had issued, the default and subsequent proceedings were set aside, at the next term, on the ground of mistake and accident; and the tenant allowed to enter his appearance. (a)

The proceedings, on the part of the demandant, were regular, and the default regularly entered.

C. G. Troup, and ———, for the tenant.

E. Howe, and *Lee*, for the demandant.

Per Curiam. The affidavits, on the part of the defendant, show, not only that he has a material defence, but that *he has been prevented from appearing on the return of the summons, by mistake and accident. Every court has the power to adapt its practice to the attainment of justice between the parties; whatever may be the *ancient* practice on writs of right, and in actions of *dower*, we cannot consent, that a party shall be deprived of his right to make a defence, when he has one to make, and has been deprived of the opportunity of doing it, by mere mistake or accident. We think the motion ought to be granted.

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Rule granted. (b)

(a) Vid. *Allen v. Smith*, 1 Cow. Rep. 180.

(b) Vide *Booth's Real Actions*, 23. 25. ch. 8. *Saver Default*. 2 *Sellon's Practice*, 295. 2 *Saund.* 43, 44. n. 1. *Co. Litt.* 259. 1 *Johns. Rep.* 329. 18 *Johns. Rep.* 504.

JACKSON, *ex dem.* HUNGERFORD and others, against
EATON. (c)

THIS was an action of ejectment, brought to recover the possession of one half of lot number ninety in *Cincinnati*. *Daniel Hungerford*, a soldier, who served in the revolutionary war, was owner of the lot, and died during the war, leaving six children, of whom *Levi H.* was the eldest, and heir at law. It was admitted,

The act of April 14, 1820, (sess. 43. ch. 245.) relative to deeds for military bounty lands, does not apply to in

(c) This cause was decided in *January* term, 1822.

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case where the subscribing witnesses to the deed are produced, at the trial, to prove its execution, or where such evidence is there offered as is competent to prove its execution at common law.

A deed, therefore, which has not been proved, or acknowledged, or recorded, according to the first section of the act of the 12th April, 1813, (sess. 36. ch. 97.) (a) on being proved at the trial, by evidence competent at common law, may be read in evidence. (b)

A person who has executed a deed, set up by a defendant in ejectment, is not a competent witness, to prove it fraudulent, especially after the lapse of 26 years, when, by avoiding the deed, the recovery of

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the plaintiff would enure to the common benefit of the plaintiff and the witness. No one, but the party to a deed, who alleges the fraud to have been practised upon him, or those claiming title under him, will be allowed to impeach or avoid the deed, on that ground.

that the lessors were children of the *soldier, but all younger than *Levi H.* The defendant offered in evidence a deed from *Levi Hungerford*, to *Daniel Hungerford*, for the whole lot, dated November 17, 1796, the consideration of which, as expressed, was 500 dollars. This deed was not proved or acknowledged, until the 18th day of September, 1820, when it was proved by *Isaac Burnham*, one of the subscribing witnesses, before *Fredrick W. Atwater*, a commissioner. The reading of this deed in evidence was objected to by the plaintiff's counsel, on the ground that *Burnham* was interested in the event of this suit, at the time he proved the deed, and to show his interest, the plaintiff introduced a deed executed by *Burnham*, in 1807, for two thirds of the premises in question, in which deed were covenants of warranty and seisin. The judge decided, that the deed could not be read in evidence without further proof. The defendant then called *Joseph White* as a witness, who testified that he knew *Charles Mudge*, one of the subscribing witnesses to the deed; that *Mudge* was dead, and that he was acquainted with his hand-writing, and had seen him write, and that he believed the name of *Mudge* to the deed to be his proper hand-writing; and also that he had seen *Burnham* write, and was acquainted with his hand-writing, and believed his hand-writing, as a witness, to be genuine. To this evidence the plaintiff's counsel objected, but the judge permitted the deed to be read. It was admitted that, in the year 1812, *John Diell* caused an ejectment to be brought against one *Hawley*, then on the lot; that in that suit, all the children of the soldier, and *Charles Brown*, *Isaac Burnham* and *John Diell*, were lessors; that a recovery was had, and a writ of possession issued, and possession taken in 1813, and that the possession was not taken by any person claiming title under the deed from *Levi* to *Daniel H.* until that time.

The defendant then introduced a deed, duly proved, from the executors of *John Diell* to himself, dated in 1815, for the consideration of 1600 dollars, for the whole lot, and proved that he had made beneficial improvements on the lot.

The plaintiff then called *Levi Hungerford* as a witness. The defendant objected to the introduction of this witness, but the judge permitted him to be sworn, subject to all objections. *He testified, that he never, to his knowledge, gave his brother *Daniel* a deed; he recollected having signed one or two papers in relation to the lot, at the request of *Robert Dickson*, who married one of his sisters. *Dickson* undertook to procure the lands; that the witness never received from *Dickson*, or any one else, any consideration for the land. On his cross examination, the witness, on being shown the deed in question, said, the signature looked like his hand-writing, and that, at the time he signed the papers, *Dickson* agreed to give him part of the land when he obtained it.

By direction of the judge, a verdict was taken for the plaintiff, for one half of the premises, subject to the opinion of the court on the foregoing case.

(a) 2 Rev. Stat. 756.

(b) *Jackson v. Phillips* 9 Cow. Rep. 94. *Jackson v. Cody*, *Ibid.* 140.

Oakley and Parker, for the plaintiff.

Cady and Morse, for the defendant.

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VAN NESS, J., delivered the opinion of the court.

The lessors of the plaintiff have shown, *prima facie*, a title to half of the lot; and the question is, whether the defendant, on his part, has shown either a better title in himself, or one outstanding in some other person; and whether he has or not, depends upon the decision of the following points:

1st. Was the deed from *Levi Hungerford*, the heir at law, at the time of the death of the soldier, to his brother *Daniel*, sufficiently proved on the trial? and if it was, then,

2d. Did the deed pass the title to the whole, or to a part of the lot only?

1. The deed from *Levi H.* to *Daniel H.* was not proved or acknowledged until the 18th of *September*, 1820, when it was proved by *I. Burnham*, one of the subscribing witnesses, before a commissioner; but it never had been recorded. *Burnham* having had, in 1807, conveyed two thirds of the lot, with full covenants of warranty and seisin, was, I think, properly held to be an incompetent witness to prove the deed before the commissioners, as he would have been, if he had been offered as a witness to prove the same fact on the trial. The testimony of *White*, who proved the *hand-writing and death of the subscribing witness, *Mudge*, and also of *Burnham*, would, in ordinary cases, be sufficient to entitle the defendant to give the deed in evidence to the jury. But, by the act of the 14th of *April*, 1820, it is enacted, that no deed relating to the title of any part of what is called the military tract, executed on or before the 1st of *May*, 1797, should thereafter be read in evidence, in any court of this state, unless the same be acknowledged or proved according to the provisions of the first section of the act concerning deeds, passed the 12th of *April*, 1813, any thing in the seventh section of said act, or any law to the contrary notwithstanding. It is argued, that this deed, not having been acknowledged or proved, cannot be read in evidence. Seldom, if ever, perhaps, has a statute of so much importance been passed, with so little regard to the previous existing law, and with so little attention, so to word it, as to effectuate the intention of the legislature. In the case of *Jackson, ex dem. Yates, v. How*, (19 *Johns. Rep.* 80.) we had occasion to examine the provisions and phraseology of this act, and we were enabled, fortunately, to give it a construction, by which the rights of many persons were preserved, which would have been destroyed, in case we had found ourselves obliged literally to follow the language in which it is couched. Another case is now presented of nearly the same kind. According to a literal interpretation of this act, it would seem, that no deed for lands in the military tract, could, at all, under any circumstances, be read in evidence, unless it was actually proved or acknowledged according to the first section of the statute of 1813; but that was not, and most certainly could not have been the intention of the legislature. And in the case just adverted to, we

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decided, in a class of cases of which the deed therein mentioned was one, that such was not their intention. It is evident that all the statutes, including that of the 14th of *April*, 1820, provide for giving deeds, or the records or transcripts of deeds, in evidence when proved, acknowledged or recorded, pursuant to the various provisions which these statutes contain. And it is equally clear, that they do not apply to cases where the subscribing witnesses are *produced on the trial*, or where such *other evidence of the execution of a deed is offered at the trial as was admissible at common law. In this case, the deed was not to be given in evidence, either as proved, acknowledged or recorded, according to any of the statutes, (*Burnham's* proof of it being rejected,) but upon such evidence as was competent to prove its execution at common law. The act of *April*, 1820, therefore, does not touch this case.

2. *Levi Hungerford*, being the heir at law of the soldier, who died during the war, and having conveyed the whole lot to *Daniel Hungerford*, on the 17th of *November*, 1796, the title to the whole lot passed by virtue of that deed to the grantee, according to the provisions of the seventh section of the act of the 8th of *April*, 1813; (1 *N. R. L.* 305.) and the defendant has thus shown a title out of the lessors of the plaintiff.

The lessors of the plaintiff have alleged that this deed from *Levi Hungerford* was obtained from him by fraud; and he was offered as a witness to prove this allegation, twenty-six years after the deed was given. To his competency as a witness, as well as to the evidence he gave, the objections are insuperable.

(1.) As to his competency: The lessors of the plaintiff seek to recover an undivided moiety of the premises; and this deed being out of the question, they are tenants in common with *Levi Hungerford*, and the recovery in this suit would be for their common benefit; for if they entered under a recovery in this suit, such entry would enure to the benefit of *Levi*, in proportion to his interest in the lot. If a suit should be brought for the mesne profits, the judgment in this action would be conclusive; and the damages recovered would be for the use of *Levi*, in the same proportion.

(2.) As to the evidence he gave: The lessors of the plaintiff have no right to set up the fraud alleged to have been practised upon *Levi*. He, or those claiming under him, alone can avoid the deed on that ground. This, as to the lessors of the plaintiff, is *res inter alios acta*. No fraud was used as to them. They claim under a title separate from, and independent of *Levi*, and not derived in any way through him; they have no right to impeach the deed *for this cause. But admitting that *Levi* was a competent witness, and that the lessors of the plaintiff might legally avail themselves of the fraud alleged to have been committed upon him, I think his testimony very loose and unsatisfactory, particularly after he has suffered this deed to remain unquestioned for such a very long period. He does not deny that he gave the deed, but complains that he never received any consideration for it, and states that he has no recollection of having executed a deed for his share of the land. This is the amount of his testimony; and if

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such evidence were allowed, to set aside a deed, especially for a military lot, the consequences would be terrible.

The defendant is, accordingly, entitled to judgment.

Judgment for the defendant.

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LION, *ex dem.* MEDCEF EDEN, against BURTISS and THE
PRESIDENT AND DIRECTORS OF THE BANK OF NEW-
YORK.

THIS was an action of ejectment, brought in *May*, 1819, to recover the possession of a house and lot in the city of *New-York*. The cause was tried before Mr. Justice *Van Ness*, at the *New-York* sittings, *December* 2d, 1820. The declaration contained three demises: from *Medcef Eden*, from *John Wood*, junior, assignee of *M. Eden*, and from *M. E.* and *J. W.*, his assignee, in all of which the *habendum* *was stated to be from the 6th of *May*, 1819. The ouster, in all the demises, was laid on the 8th of *May*, 1819, on which day the action was commenced, by a service of the declaration on the tenant. The defendants confessed lease, entry and ouster, and that they were in possession at the commencement of the suit.

It was proved, that *Medcef Eden*, the elder, died seised of the premises in question, on the 14th of *September*, 1798, having made his last will, in due form of law, to convey real estate, dated *August* 29, 1798, leaving two sons, *Joseph* and *Medcef*. The will, among other things, contained the following clauses: "I give, &c. unto my son *Joseph*, my three houses, &c., in *Gold street*, &c.; also, five houses and lots, &c. in *Riders street*, &c.; also, one house and lot in *Broadway*, &c., next to the corner of *Robinson street*, &c.; also, my farm, &c. near *Kingsbridge*; also, one other farm, in the *Manor of Fordham*, &c.; also, twelve acres of land, &c., at *Bloomingdale*, &c.; also, five houses and six lots of ground, &c. situate in *Bayard's lane*, of the seventh ward of the said city, (which included the premises in question;) also, a house and lot, &c. in *Greenwich road*, &c.; also, a house and lot, &c. in *Nassau street*, &c.; to have and to hold, &c. all and singular, &c. the hereby bequeathed premises, unto the sole and proper use and behoof of my said son *Joseph*, his heirs, &c. forever."

"And I give, &c. to my son *Medcef*, all and singular my farm, &c., at *Bloomingdale*, on the north side of the road, &c.; also, ten acres on the south side of the road, &c.; also, the house and lot in the *Bowery road*, &c.; also, one house and lot in *Broadway*,

Joseph, the limitation over, which was good as an executory devise, vested in *M.*, the surviving son; and the devise in his favor having taken effect, ceased to be executory, and he became seised in fee tail, by necessary implication of law, with a remainder expectant in favor of *John E.* and *H. J.*, the brother and sister of the testator; and by virtue of the statute of the 23d of *February*, 1786, abolishing estates tail, *M.* became seised in fee simple absolute, of all the estate devised to his brother *Joseph*. (a)

A person holding land by *deforcement* merely, cannot levy a fine so as to affect or bar a stranger to it.

(a) Vid. *Jackson v. Christman*, 4 *Wendell's Rep.* 277. *Jackson v. Elmendorf*, 3 *Ibid.* 222. *Varrick v. Jackson*, 2 *Ibid.* 166. *Jackson v. Thompson*, 6 *Cow. Rep.* 178. *Wilkes v. Lion*, 2 *Ibid.* 333.

E. died in *September*, 1798, having, by his last will, dated *August* 29, 1798, devised lands to his son *Joseph*, in fee; and other lands

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to his son *Medcef*, in fee; and added, "It is my will, and I do so order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor; and, in case of both their deaths, without lawful issue, then I give all the property, &c. to my brother *John E.*, of, &c., and sister, *Hannah J.*, of, &c., and their heirs." *Joseph*, one of the sons, died in *August*, 1812, without lawful issue, leaving his brother *M.* surviving, who, afterwards, died, on the 26th of *July*, 1819, without lawful issue: Held, that on the death of the testator's son

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now occupied by *B. Judah*; also, two houses and lots, &c. at the *Old Slip*, &c.; (describing other houses and lots in the city;) to have and to hold, &c., unto the only proper use, &c. of my said son *Medcef*, his heirs and assigns, forever," &c.

"*Item.* It is my will, and I do order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor; and in case of both of their deaths, without lawful issue, then I give all the property aforesaid, to my brother, *John Eden*, of *Loftus*, in *Cleveland*, in *Yorkshire*; and my sister *Hannah Johnson*, of *Whitby*, in *Yorkshire*, and their heirs."

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*On the death of the testator, *Joseph* entered into possession of the premises in question, as part of the lands devised to him, situate in *Bayard's lane*, &c. Afterwards, on the 16th of *May*, 1801, all the right and title of *Joseph Eden* to the premises in question were sold at public auction by the sheriff of *New-York*, by virtue of a *fi. fa.*, issued on a judgment in the Supreme Court, to *Robert Bowne*, the highest bidder, who purchased the same for the use of the *Bank of New-York*; and the sheriff, accordingly, executed a deed to *R. Bowne*, who entered and was possessed of the premises, in trust; and on the 23d of *February*, 1815, conveyed the premises to the *Bank of New-York*, who entered into possession thereof, under the deed to them, and have since been in possession.

Joseph Eden died on the 29th of *August*, 1812, without issue, leaving *Medcef Eden* surviving him.

On the 16th of *April*, 1816, the *Bank of New-York* duly executed and delivered a deed of bargain and sale, in fee simple, of the premises, to *C. B. Goelet*, in order to make him a tenant to the *præcipe*, for the purpose of levying a *fine*, which was accordingly levied and completed, in due form, in *January* term, 1817. The writ of covenant was tested the 13th of *January*, 1816. The first proclamation was made in *May* term, 1816, and the last proclamation in *January* term, 1817.

The records, papers, and proceedings, relating to the levying the *fine*, were read in evidence. The plaintiff's counsel insisted, that the *fine* was null and void, because the parties thereto had no estate in the premises, at the time, but, according to their own showing, were mere tenants at sufferance of the lessors of the plaintiff, &c. The judge, without giving any opinion, reserved the point.

The defendants offered to show, that *Medcef Eden*, the younger, had died since the commencement of the suit, to wit, on the 26th of *July*, 1819, without issue. The plaintiff objected to the testimony, but it was admitted by the judge, and the plaintiff excepted to his opinion.

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The plaintiff then proved an entry on the premises by *E. Baldwin*, by virtue of a letter of attorney to him from **Medcef Eden* for that purpose, on the 6th of *May*, 1819, and that he there executed the lease mentioned in the declaration. The plaintiff then gave in evidence the will of *Medcef Eden*, the younger, dated *July* 23, 1819, whereby he devised all his real and personal estate to his wife, for life, &c., who was living.

Both parties excepted to the opinion of the judge, on every point raised at the trial, and decided against them, with liberty to bring up the points before the court, to be argued, on a case to be made.

A verdict was taken for the plaintiff, by consent, subject to the opinion of the court, on a case to be made, with liberty to either party to turn it into a special verdict, or bill of exceptions, or both, at the election of either party; all papers and other documents, produced on the trial, to be part of the case.

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Burr, for the plaintiff.

S. Jones, for the defendants.

SPENCER, Ch. J., delivered the opinion of the court. This case arises under the will of *Medcef Eden*, the elder. In the case of *Anderson v. Jackson*, (16 Johns. Rep. 382.) this will received a construction in the Court for the Trial of Impeachments and the Correction of Errors. The judgment of the Supreme Court was affirmed. It was decided, that *Medcef Eden*, the younger, on the death of his brother *Joseph*, without issue, took by way of executory devise, the lands devised to *Joseph*. This action is for the recovery of part of the real estate thus devised to *Joseph Eden*. The suit was commenced in May, 1819; and on the 26th of July thereafter, *Medcef Eden*, the younger, died without issue; and the question between these parties is, whether the whole estate became vested in *Medcef Eden*, or whether the limitation over to *John Eden*, and *Hannah Johnson*, upon the events which have happened; vests the real estate devised to *Joseph Eden* in them.

The case states, that *Medcef Eden*, the elder, made his will in due form, and competent to pass real estate, on the 29th *of August, 1798, whereby he devised to his son *Joseph* certain real estate, including the premises in question, and to his heirs and assigns forever. After devising other real estate to his son *Medcef*, also in fee, there is the following clause in his will: "*Item*. It is my will, and I do so order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, then I give all the property aforesaid to my brother, *John Eden*, of *Loftus*, in *Cleveland*, in *Yorkshire*, and my sister, *Hannah Johnson*, of *Whitby*, in *Yorkshire*, and their heirs."

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In the case of *Anderson v. Jackson*, it was decided, that the devise to *Joseph Eden* did not create an estate tail, but that the devise over upon the event of his dying without issue, was a limitation over, as an executory devise, to *Medcef*, the survivor. The opinion of the court was, that the devise over to the survivor did not depend on an indefinite failure of issue, but only on the failure of issue at the time of *Joseph's* death. This, then, is the law of the land, and must govern every other case coming within the same principle. I must be allowed to say, that subsequent reflection has confirmed my conviction of the soundness of the decision of the Court of Errors. *Stare decisis* is a maxim essential

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to the security of property; the decisions of courts of law become a rule for the regulation of the alienation and descent of real estate, and where that rule has been sanctioned and adopted in our courts, it ought to be adhered to, unless it be manifestly wrong and unjust. We have, fortunately, little experience with regard to estates tail. It is a tenure opposed to the genius of our institutions; and in the year 1782, during our revolutionary struggle, the legislature evinced its entire hostility to a form of conveyance which had a tendency to obstruct the free alienation of real property.

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The will under consideration was made subsequent to the acts of the twelfth of *July*, 1782, and of the twenty-third of *February*, 1786; both of which statutes converted not only existing, but future estates in fee tail, into fee simple absolute. These statutes formed an important epoch in our history. *They broke into pieces the shackles which had been ingeniously contrived to perpetuate estates in the same family, and thus rendered the alienation of the soil free and unrestrained. It will be perceived, that the deviser, in this case, made use of no words denoting an intention to devise *in fee tail* the estate given to his son *Joseph*, and it was urged that it was a fee tail only by implication of law: but it seems to me, that since our statutes, any expression denoting an intention to limit the failure of issue to a life in being, such as the word "survivor" in this case, is, with us, sufficient to repel the implication, that a limitation of an estate over, in the event of the first devisee's dying without issue, was meant to be an estate in fee tail, and thus defeat the real intention of the deviser; but, on the contrary, it appears to me that no such intent ought to be implied, if there be any other method of effectuating the real intention of the testator. I cannot bring myself to doubt, that when the testator in this case declared it his will, that if either of his sons departed this life without lawful issue, his part or share should go to the survivor, he meant and intended, what is perfectly intelligible, the lawful issue, living at the time of the death of the son who first died; and this construction is evident, from the consideration, that the surviving son was to inherit the part devised to the son who should first die without lawful issue; thus clearly denoting an intention that the surviving son should personally be benefited, by enjoying the estate which his brother had left, without issue to inherit it. The case of *Smith and Wife v. Chapman* (1 *Hen. & Mun.* 303. 306.) contains principles in accordance with the doctrine I have advanced; but it is not my purpose to enlarge upon this point. The law is settled, and I think well and justly. The limitation over to the brother and sister of the testator omits the word *survivor*, which was considered very significant and important in showing the intent of the testator, when he gave the estate to the surviving son, in case the other died without lawful issue; but it is urged by the defendant, that as the whole is in one sentence, and the devise over to persons *in esse*, the same common intent is applicable to the limitation over to the brother and sister of the deviser, if both his sons died without issue, and that the same *consequence would follow.

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But as there are other principles which apply to the last devise, it is unnecessary to decide this point.

The question then arises, whether, upon the event which has happened, the death of the testator's sons without issue, his brother and sister can take under the devise, as an executory one. In 2 *Saund.* 388. *h.* Serjeant *Williams*, in a note, says, "With regard to executory devises, it is a rule, that wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken;" but he adds, "However, it seems to be established, that wherever the first limitation vests in *possession*, those that follow vest in interest at the same time, and cease to be executory, and become mere vested remainders, subject to all the incidents of remainders." He refers to *Stephens v. Stephens, Cas. temp. Talbot*, 228. *Hopkins v. Hopkins*, 1 *Atk.* 581. and *Doe v. Fonnereau, Doug.* 479. *Cruise* (vol. 6. 517. tit. 38. ch. 20. s. 26—28.) and *Fearne* (411. 419, 420. 6 *Ed.* 526.) concur in this opinion; and the adjudged cases fully support the rule, as laid down by these learned commentators. The case of *Brownsword v. Edwards* (2 *Ves. sen.* 243.) contains the same doctrine. The estate, then, of *John Eden* and *Hannah Johnson* was turned into a remainder, when the executory devise took effect in favor of *Medcef Eden*. The devise to them then ceasing to be executory, *Medcef* became seised in fee tail by necessary implication of law, with a remainder expectant in favor of *John Eden* and *Hannah Johnson*. For it never was doubted, in the argument of the case of *Anderson v. Jackson*, that if the limitation over to the surviving son of the testator, in the event of one of them dying without lawful issue, did not operate as an executory devise, it would necessarily be a fee tail; and therefore it follows, inevitably, that wherever the executory devise ceased, and could no further operate, the estate in possession became a fee tail, and the subsequent remainder became, by operation of law, limited on a fee tail; consequently, if our statute abolishing estates in fee tail had not passed, this remainder might have been destroyed by a fine or recovery by *Medcef Eden*. (5 *Cruise*, 471. 6 *Cruise*, 523.)

The statute (1 *N. R. L.* 52.) enacts, "that in all cases, *when any person, or persons, would, if the said act, (the act of the 12th of *July*, 1782,) and this present act had not been passed, at any time hereafter, become seised in fee tail of any lands, tenements, or hereditaments, by virtue of any devise, gift, grant, or other conveyance, heretofore made, or hereafter to be made, or by any means whatsoever, such person or persons, instead of becoming seised thereof in fee tail, shall be deemed and adjudged to become seised thereof in fee simple absolute." This statute was passed in 1786, and the will was made in 1798, and thus *Medcef Eden* became the absolute and unqualified owner in fee simple, of all the real estate devised to *Joseph*.

The second question in this case is, whether the fine is a bar to the recovery. It is a settled principle, that if a person who is possessed of land for a term of years only, or is a tenant at will, or who has an estate less than a freehold, levies a fine, it will not affect strangers. (5 *Cruise*, 87. s. 20, 21.) A stranger to a fine

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has a right to aver *quod partes finis nil habuerunt*. The statute (1 N. R. L. 361.) (a) gives to such as are not parties or privies to the fine, a right to except, and to avoid the fine, if those who were parties to it, or any person to their use, had nothing in the lands and tenements comprised in the fine.

It appears in this case, that the sheriff of *New-York* sold the premises in question, with other lands, to *Robert Bowne*, on the 16th of *May*, 1801, under a judgment in favor of *John Wardell* against *Joseph Eden*. On the 23d of *February*, 1815, *Robert Bowne* and his wife conveyed the premises thus purchased to the *Bank of New-York*; the deed recites the sheriff's sale to him, and that the consideration mentioned in the sheriff's deed, were the proper moneys of the bank, and paid by them, and that his name was used only in trust. The deed from the bank to *Goelet*, on which the fine was levied, is a deed of bargain and sale; the writ of covenant is tested the 13th of *January*, 1816, and the fourth and last proclamation was made in *January*, 1817. The case states, that *Joseph Eden* died on the 29th of *August*, 1812. Thus it appears, that the title of the bank terminated on the death of *Joseph Eden*, and the right to the premises had become vested in *Medcef Eden* long before the fine was levied. *The bank having succeeded to the right of *Joseph Eden*, which was co-extensive only with his estate, on his death, they had no other estate than that of mere possession. They entered into possession rightfully, under the title derived by *Joseph* from the will of his father, but the event having happened by which his estate was defeated, the bank had no other interest than that of naked possessors. In *Coke* 9. 106. a. 5 *Rep.* 123. b. and 2 *Inst.* 517. the rule is thus laid down, that no fine levied with proclamations, shall bind any but those who are put out of possession, and have but a right; for if their estate or interest be not divested out of them, but remains in them, as it was *ab initio*, they need not make a claim or entry to that which was never divested. The continuance of the bank in possession after the death of *Joseph Eden* was not a disseisin, but a mere deforcement, which is defined to be, the holding of any lands or tenements, to which another person hath right. And it is distinguished from abatement, intrusion, disseisin, or a discontinuance, in this, that it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which belong to the other classes. (3 *Black. Com.* 172, 173.) I am, therefore, of opinion, that the bank, who were cognizors, had no estate in the premises enabling them to levy the fine, and that, consequently, no entry was necessary to avoid its effects. In this case, however, there was the necessary entry within five years, given by the statute, after the last proclamation. All that is necessary is, that there be an entry within the five years, *animo clamandi*. (*Cruise's Dig.* tit. 35. ch. 14. p. 237. s. 46, 47, 48, 49.) And here it appears, that *Medcef Eden*, on the 30th *April*, 1819, gave a power of attorney to *Baldwin*, authorizing him, in his name, to enter and take possession of that part of the real estate of his father which was devised to his brother *Joseph*, and to

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(a) 2 *Rev. Stat.* 343.

execute leases in his name; declaring in the power his sole meaning to be, to enable him to institute suits for the trial of his title to the said lands; and, in the mean time, to maintain his right of entry, title, and claim to the said lands; and it was proved, that under this letter of attorney, *Baldwin* entered on the premises, on the 6th of **May*, 1819, and there executed and delivered to the plaintiff, *Lion*, the lease mentioned in the first count in the declaration. There can be no doubt but that this was a sufficient entry and claim to prevent the defendants setting up the fine as a bar, if the cognizers had any estate in the premises.

The last objection, that *Medcef Eden*, the elder, had no legal title to the premises, at the time of his death, is wholly unsupported. The case states him to have been seised of the premises when he devised the same; but the defendants claim under *Joseph Eden*, who took the premises under the will; and surely the defendants are estopped from denying that they entered under *Joseph's* title.

Judgment for the plaintiff.

IN THE MATTER OF THE OATHS TO BE TAKEN BY ATTORNEYS AND COUNSELLORS.

THE clerk being about to administer the oaths to the attorneys and counsellors who had been examined and admitted this term, a question arose, which was submitted to the court, whether the "act to suppress duelling," passed *November* 5, 1816, (sess. 40. ch. 1.) has been repealed by the sixth article of the new constitution, so that no other oath, than the one prescribed by the fourth section of the *act concerning counsellors, attorneys and solicitors*, (sess. 36. ch. 48. 1 *N. R. L.* 416.) (a) for the faithful discharge of the duties of the office, could be required of them.

PLATT, J. The "act to suppress duelling," passed *November* 5th, 1816, requires "every member of the senate or of the assembly, and every person who shall be elected or appointed to any office or place, civil or military, except town officers; and every person who shall be admitted a counsellor, attorney or solicitor of the Court of Chancery, Supreme Court, *or Court of Common Pleas," &c., to take an oath that he has not been engaged in a duel, &c.

The sixth article of the new constitution of this state, which took effect from and after the last day of *December* last, ordains, that members of the legislature, and all officers, executive and judicial, except such inferior officers as may by law be exempted, shall take and subscribe an oath or affirmation to support the constitution of the *United States*, and the constitution of this state, and also faithfully to discharge the duties of his office; and that "no other oath, declaration, or test, shall be required as a qualification for any office or public trust."

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The new constitution (art. VI.) has not abrogated the provisions of the act to suppress duelling, which requires counsellors, attorneys and solicitors, to take the oath prescribed in that act, in addition to the usual oath of office.

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(a) 2 *Rev. Stat.* 686.

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The question now presented, is, whether the new constitution has repealed the provision of the "act to suppress duelling," in regard to the oath required to be taken by attorneys and counsellors of this court. The point is simply, whether an attorney or counsellor holds an *office* or *public trust* in the sense of the constitution. Lexicographers generally define "office" to mean "*public employment*;" and I apprehend its legal meaning to be an employment on behalf of the government, in any station or public trust, not merely *transient, occasional* or *incidental*. In common parlance, the term "*office*" has a more general signification. Thus, we say the *office* of *executor*, or *guardian*; or the *office* of a *friend*. In my judgment, an attorney or counsellor does not hold an *office*, but exercises a *privilege* or *franchise*. As attorneys or counsellors, they perform no duties on behalf of the government; they execute no *public trust*. They enjoy the exclusive privilege of prosecuting and defending suits for clients, who may choose to employ them. Various classes of persons are licensed in the city of *New-York*, with an exclusive privilege in their employment; yet they are not public officers. *Physicians* are also licensed, pursuant to statutes; yet they hold no *office* or *public trust*, in legal construction. *Lawyers* are licensed to practise in one of the learned professions, and *physicians* in another; and there are many regulations by law, for their government, as distinct orders of men in society; but they are not trustees, nor agents, for the public, any more than persons licensed to carry on the business of banking. The fees of **attorneys* are fixed by law; and so is the compensation of *cartmen*, and *bakers*, and *ferry-men*.

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In deciding this question, it is of some importance to remark, that the legislature, in framing the "act to suppress duelling," have discriminated between *public officers*, and *attorneys* and *counsellors*. They provide not only, that "persons elected or appointed to any office or place, civil or military," but that "persons *admitted*" as *counsellors* and *attorneys*, shall also take the oath: Thus, by fair inference, giving an exposition which shows that *lawyers*, in their contemplation, were not *public officers*.

I am, therefore, of opinion that the new constitution has not abrogated the provision of the act which required attorneys and counsellors to take this oath.

WOODWORTH, J., concurred.

SPENCER, Ch. J., dissented.

[* 495] *JACKSON, *ex dem.* BAYARD and others, *against* HEALY. (a)

In the proceedings under "the act to reduce several laws, relating particularly to the city of *New-York*, into one

EJECTMENT for a lot of ground, in *Ridge street*, in the city of *New-York*, tried at the *New-York* sittings, before Mr. Justice *Van Ness*, in *November* last. A verdict was taken for the plaintiff, subject to the opinion of the court on a case. The title to the premises in question was admitted to be in the lessor of the plain-

(a) This case was decided in *August* term last.

tiff, subject to the operation of the assessment, laid by the corporation of the city of *New-York*, for filling up *Stanton street*, and the proceedings under it.

It appeared, that *E. Bancker*, a city surveyor, in 1784, laid out a block of land, being part of *Delancey's* farm, and the tier of lots, including the premises in question, fronted on *Ridge street*, each lot being 25 feet in front on that street, beginning at the corner of *Stanton street*, and each 100 feet deep; and the lots have been so described as fronting on *Ridge street*, in all the conveyances since that time, and have been assessed for ordinary taxes, which were paid by those from whom the plaintiff derived his title. The lot in question was conveyed to the lessors of the plaintiff by the trustees of *Isaac Moses*, as fronting on *Ridge street*, being the fourth lot from the corner of *Ridge* and *Stanton streets*.

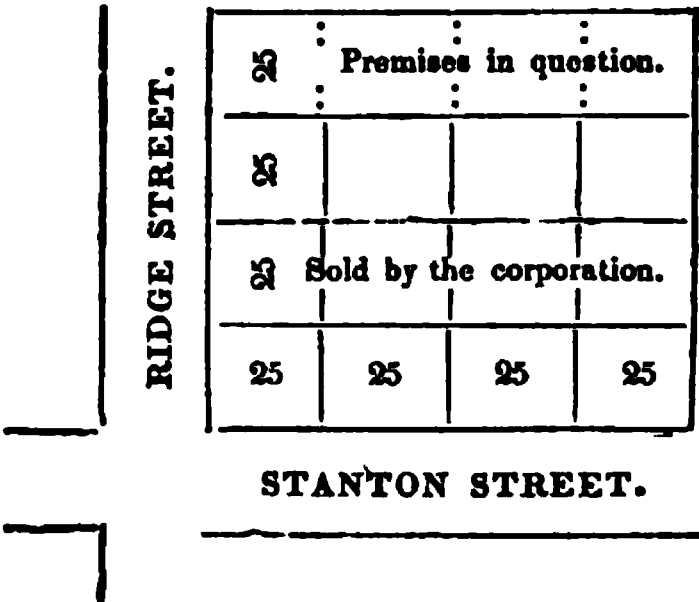
By the ordinances, assessments and proceedings of the corporation, which were given in evidence, it appeared that, pursuant to the resolutions of the board, an assessment was laid upon lots in *Stanton street*, to defray the expense of filling up and repairing that street; and that three lots, beginning at the north-east corner of *Stanton* and *Ridge streets*, and described as fronting on *Stanton street*, each 25 feet wide, and belonging to *Benjamin F. Haskins*, but without mentioning the depth, were included in the assessment. *Haskins* became the purchaser at the sale, for the term of 90 years; and the conveyance to him by the corporation, described the lots as lying on the north side of *Stanton street*, between *Ridge* and *Pitt streets*, being part of a block distinguished on the *Delancey* farm, by number 24, lying adjoining to each other, and containing, together, about 75 feet, front and rear, and about 100 feet deep; bounded on the south, in front, by *Stanton street*; on the west, by *Ridge street*; on the north, in the rear, by other part of the said block number 24, &c. (a)

T. L. Ogden, for the plaintiff.

Bogardus, contra.

Per Curiam. This is an ejectment for a house lot, fronting on *Ridge street*, in the city of *New-York*. The title of the plaintiff

(a) The following diagram will show the interference of the lots sold by the corporation, with the lot owned by the lessors of the plaintiff.



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act," (2 N. R. L. 342. sess. 36. ch. 86.) relative to streets, &c. in the city of *New-York*, the assessment laid by the corporation for that purpose, and the notice thereof, must describe the property assessed, with accuracy and precision, so as to apprise the owner distinctly of the ground charged for the expense of the improvements. If, therefore, the assess-

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ment describe lots fronting on *S. street*, as 25 feet wide in front, belonging to *H.*, without mentioning the depth, and they are, afterwards, sold and conveyed by the corporation, as fronting on *S. street*, and "about 100 feet deep," when, in fact, the lots of *H.* were only 75 feet deep, such conveyance will not be construed to extend the lots in depth, beyond 75 feet, so as to include the lot of *B.* in the rear, and which fronted on another street.

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to the lot in question is admitted, unless his title has been divested by virtue of a sale under an ordinance of the corporation, for non-payment of an assessment for filling up *Stanton street*.

The assessment was upon three lots "on the north side of *Stanton street*," as the property of "*Benjamin F. Haskins*," numbers 4, 5, 6, being 25 feet front, and no depth mentioned.

The deed from the corporation specifies about 25 feet, front and rear, and about 100 feet deep.

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*This deed, if it extend more than 75 feet in depth, will include the premises in question, and defeat the plaintiff's title derived under *Isaac Moses*.

There was nothing in the assessment, or any other proceedings on the part of the corporation, to apprise the plaintiff that any lots were assessed except those fronting on *Stanton street*.

On the part of the plaintiff, it is shown, that in 1784, *Evert Bancker*, city surveyor, laid out the lots to front on *Ridge street*; that the lot in question was conveyed to the lessors of the plaintiff, by the trustees of *Isaac Moses*, as fronting on *Ridge street*, 25 feet, front and rear, and 100 feet deep; and it has been so described in all the conveyances since 1784; and, as such, it has been several times assessed for ordinary taxes, paid by *Moses* and others: but the whole square was open, unoccupied ground, without monuments, or enclosures, when assessed and sold.

The principle cannot be tolerated, that the true owner can be divested of his title by such vague and indefinite proceedings, on the part of the corporation. Before they can give an operative conveyance under the statute in such cases, the assessment and notice must be such, as to apprise the owner distinctly of the ground so charged for the improvements. It is remarkable, in this case, that *Benjamin F. Haskins* is advertised as owner of the lots fronting on *Stanton street*; and he is the purchaser under the corporation. Now, although *Haskins*, being the owner of the three corner lots, had a right to alter the location and allotment, so as to front on *Stanton street*, as it appears he did; yet it seems very clear, that he must have known, that those lots extended only 75 feet in depth; instead of "about 100 feet," as expressed in the deed to him from the corporation.

Upon the whole, we think it a very clear case for the plaintiff.

Judgment for the plaintiff.

END OF JANUARY TERM

CASES

ARGUED AND DETERMINED

IN THE

Court for the Trial of Impeachments

AND

THE CORRECTION OF ERRORS

OF THE

STATE OF NEW-YORK,

IN SEPTEMBER AND NOVEMBER, 1822.

GEORGE B. EVERTSON, *appellant*,
against
GEORGE BOOTH and others, *respondents*.

J. TALLMADGE, Jun., for the appellant, moved, that the *remittitur* in this cause, in which a decree of reversal was pronounced by this court, at its last session, (see 19 *Johns. Rep.* 486.) be amended or modified, so as to give the appellant costs. He observed, that the *remittitur* had not yet been sent to the Court of Chancery, and was, therefore, in the power of the court. He also moved, that the appellant be allowed interest on his deposit. He said, that prior to the act of April 12, 1813, (1 *N. R. L.* 343. sess. 36. ch. 96. s. 13.) (a) no costs were allowed on the reversal of a decree; and the cases of *Le Guen v. Gouverneur* (1 *Johns. Cases*, 522.) and *Farquharson v. Mabee* (3 *Johns. Rep.* 553.) were decided before that statute was passed. But in *Parkhurst v. Cortlandt*, (14 *Johns. Rep.* 45.) decided since that time, the right of the appellant to costs, on the reversal of a decree, had been established.

Costs are not allowed on appeal in this court, on the reversal of the decree of the Court of Chancery: Nor, it seems, interest on the deposit of money, on filing the appeal.

SPENCER, Ch. J. In that case, the *remittitur* was so *drawn up incorrectly; but it was, afterwards, corrected by the court, during the same session, and the costs struck out.

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Tallmadge. In the cases of *Simson v. Hart*, (14 *Johns. Rep.* 63—77.) and *Anderson v. Roberts*, (18 *Johns. Rep.* 515—543.) afterwards decided, costs were allowed.

(a) 2 *Rev. Stat.* 618.

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P. Ruggles, contra. In the cases of *Simson v. Hart* and *Anderson v. Roberts*, in which it is said, that the decrees were reversed, with costs, it is evident, and so this court must be understood to mean, with costs to the appellants in the Court of Chancery. It is not said, that the appellants were to have costs in this court, on the reversal. The statute referred to speaks only of the reversal of a judgment on a *writ of error*. We have always supposed it to be a settled rule, that no costs were allowed in this court, in a case like the present, of a reversal on *appeal*. The appellant cannot justly claim *interest* on his deposit. The money was deposited, and withheld from him, by an order of the court.

SPENCER, Ch. J. I very much doubt whether the decree in this cause can now be modified at all; but if it could, I recollect no instance in which we have allowed costs on the *reversal* of a decree of the Court of Chancery. (a)

PLATT, J., and WOODWORTH, J., concurred.

September 4th. *Per totam Curiam.* Motion denied.

(a) Vid *Legg v. Overbagh*, 4 *Wendell's Rep.* 188. *Murray v. Blatchford*, 2 *Wendell's Rep.* 221. 2 *Rev. Stat.* 618.

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*DAVID WOODCOCK, *appellant*,
against
SILAS BENNET, *respondent*.

A cause cannot be entered on the calendar of causes to be heard, until after the *petition of appeal*, addressed to the court, and the *answer* of the defendant to such appeal, have both been regularly filed in this court.

Notices, copies of orders, affidavits, &c. may be served on the *counsel* for the parties in the causes, or on the *agents* of the attorneys of the parties; but, in the latter case, double time of service is allowed.

BUTLER, for the appellant, moved to strike this cause off the calendar, on the ground, that the appellant not having filed his *petition of appeal*, addressed to the court, it was not in a state to be placed on the calendar of causes to be heard. It appeared, that the register of the Court of Chancery had transmitted to this court the original appeal filed in that court, addressed to the chancellor, together with a transcript of the proceedings in the cause in that court. The respondent then filed, in this court, his answer to a petition of appeal, (though no such appeal had been filed here,) and the cause was placed on the calendar by the clerk.

Sherwood, contra.

Per Curiam. The appellant must file his petition of appeal, addressed to this court, before it can be possessed of the cause. By the rules of this court, (a) that petition must be filed in the office of the register, or assistant register, with whom the decree, or order appealed from, has been entered; and he annexes to it the decree, or order appealed from; and the petition of appeal, with the matter annexed, is to be brought into this court and filed. The *answer* of the respondent to that petition, is, then, to be filed in this court; and the cause being at issue, may then be placed

(a) Vide 16 *Johns. Rep.* 604, Rule VII.

on the calendar. The motion, in the present case, must, therefore, be granted; but if the respondent is desirous of hastening the appellant, he may enter a rule, in this court, requiring the appellant to file his petition of appeal in eight days, or be precluded.

**Sherwood* said he would take a rule accordingly, and inquired whether a service of it upon the *counsel* for the appellant would be sufficient, as his solicitor resided in a distant county.

PLATT, J., said, that it was made a question, at a former session of the court, whether such a service was good, and the court expressed their opinion that it was sufficient.

Per Curiam. Papers in this court may be served on the *counsel* in the cause.

Sherwood then asked for a shorter rule than *eight* days, but the court said he must take the usual rule.

NOTE. *Saturday, September 7.* The chief justice read an order respecting the service of papers in this court, which the court adopted, and which is as follows: "ORDERED, that the service of all notices, copies of orders, and affidavits, in this court, during the sitting of the court, may be made on the counsel for the parties, and also on the *agents* for the attorney of the parties; but when made on agents, double the time of service shall be allowed."

The *chief justice* said, that by agents was meant *agents* in the Supreme Court.

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Sept. 6th.

BENJAMIN PRINCE, Public Administrator in the City of
New-York, *appellant*,
against

GEORGE HAZLETON, and MARY, his Wife, *respondents*.

THIS cause came before this court, on an appeal from a decree of the Court of Probates, in the matter of granting *administration on the estate of *William Jones*, of the city of *New-York*, deceased. The appellant, who is the *public administrator* of the city of *New-York*, appointed pursuant to the statute, (sess. 38. ch. 157.) sued out a citation to the widow and next of kin of *William Jones*, deceased, to show cause before *Sylvanus Miller*, Esquire, surrogate of the city of *New-York*, on the 17th of *May*, 1820, why administration should not be granted to the appellant, according to the statute. *Mary Hazleton*, one of the respondents, appeared before the surrogate, and offered for probate a *nuncupative will*, with the depositions of four witnesses thereto, taken, *ex parte*, the 4th of *May*, 1820, before a commissioner, in proof of such will, which was as follows: "The last will and testament of *William Jones*, late of the city of *New-York*, gentleman, by word of mouth,

A *nuncupative* will is not good, unless it

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be made when the testator is in *extremis*, or overtaken by sudden and violent sickness, and has not time to make a written will. By the words "last sickness," in the purview of the statute, (sess. 36. ch. 31. sec. 14. 1 N. R. L. 303—307.) (a) is to be understood the last extremity.

(a) 2 Rev. Stat. 60.

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made and declared by him, on or about the eleventh day of *April* last past, in presence of us, the undersigned, *Jacob S. Arden*, *William Lee*, *George Waters* and *Ellen Taylor*, who have hereunto subscribed our names as witnesses to such last will and testament: 'I now say, as I have repeatedly said before, that I leave all the property I am possessed of to *Mary Hazleton*; I do this in consequence of the good treatment and kind attention I have received from her during my sickness. She is worthy of it. No other person shall inherit my property. I wish you all in the room to take notice of this.' In witness whereof, we have hereunto set our hands, this seventeenth day of *May*, in the year of our Lord, one thousand eight hundred and twenty." Signed by the four persons above named. It appeared, that the supposed testator died on the 17th of *April*, 1820.

The four witnesses above named, and five other witnesses, were examined before the surrogate, in support of the will, and nine witnesses deposed as to the character of *William Lee*, one of the witnesses to the will. Fifteen witnesses were examined before the surrogate against the will so offered, and three witnesses deposed against the character of *William Lee*. The surrogate decided, that the will was not sustained; and on the 17th of *October*, 1820, pronounced the following sentence: "The surrogate of the city and county of *New-York*, having heard counsel in the above *matter, and maturely considered the same, and having also examined the evidence adduced in the premises, after due examination of the law, and the testimony applicable and relevant thereto, doth order, sentence, adjudge and decree, that the nuncupative will of the said deceased cannot be admitted to probate, and that the application, therefore, be dismissed; and it is further ordered, sentenced, adjudged and decreed, that letters of administration of the goods, chattels and credits, which were of the said deceased, be granted and issued, according to law, as in cases of intestates."

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There was an appeal from this sentence to the Court of Probates, at *Albany*, by the present respondents. The judge of the Court of Probates, having heard the proceedings and proofs returned by the surrogate read, and the arguments of the counsel in the cause, on the 19th *June*, 1821, pronounced the following decree: "It is ordered, adjudged and decreed, and this court doth order, adjudge and decree, that the decree of the said surrogate, in the said matter, be reversed: and it is further ordered, adjudged and decreed, that the nuncupative will of the said *William Jones*, deceased, having been duly proved, be admitted to probate; and that letters of administration, with the said will annexed, be issued thereon, out of this court, to *Mary Hazleton*, the legatee in the said will named." From this decree, the public administrator of the city of *New-York* appealed to this court.

As this court reversed the decree of the Court of Probates, as well on the *law*, as on the facts of the case, it is deemed unnecessary to state the voluminous depositions read in the cause, all of which were set forth, at length, in the printed case, as the

leading facts are mentioned in the opinions of the members of this court. IN ERROR

The cause was argued by *Hoffman*, and *T. A. Emmet*, for the appellant; and by *Henry*, and *Van Buren*, for the respondents. In their arguments, which continued during four days, the counsel went into a very minute and critical examination of the depositions, and the character of the witnesses, and weight of evidence, on both sides; but it will *be sufficient here, briefly to state the points and authorities as to the question of law arising in the cause.

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For the appellant, it was contended, that the will had not been proved to be a good *nuncupative* will, within the meaning and intent of the statute, (sess. 36. ch. 23. s. 14. 1 *N. R. L.* 364—367.) (a) which declares, that no such will shall be good, unless “made in the time of the last sickness of the deceased.” This statute was passed to remedy the great abuses which existed in practice, and it has added many restrictions. Such a will, therefore, must not only have all the requisites existing at common law, but all those prescribed by the statute, concerning which *Blackstone* (2 *Bl. Com.* 500.) observes, “that the legislature has provided against frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing has fallen into disuse; and is hardly ever heard of, but in the only instance where favor ought to be shown to it, when the testator is surprised by sudden and violent sickness.” *Perkins* (*Profitable Book, or Treatise of the Laws, &c.* first printed in 1538, p. 279. sec. 476.) says, that such a will must be made when the testator lies languishing, for fear of sudden death, and dare not stay to have his testament written. (*Swinburne on Wills*, part 1. s. 12. 1 *Inst.* 24. *Plowden*, 57. 7 *Bac. Abr.* by *Gwillim*, 305. tit. *Wills*, D. 6 *Wood’s Convey.* 574, 575. *Swinburne*, 517, 518. part 7. s. 18. 1 *Phillimore Rep.* 49. 88, 89. 50. 57. 102. 19.) Such a will must be made while the party is *in extremis*: and all the witnesses must agree, when they reduce the will to writing, in making the testator speak the same words. It is not sufficient to state the substance or effect of them.

For the respondents, it was contended, that it was not essential to a good nuncupative will, that it should be made while the testator was *in extremis*. That the words “last sickness,” in the statute, do not require such a construction. *Perkins* and *Swinburne*, who wrote before the statute of 29 *Charles II.* ch. 3. from which our statute has been taken, merely describe the mode or circumstances in which such wills are ordinarily made; they do not say that the law requires *that those precise circumstances should exist in all cases, in order to render a nuncupative will valid. The common law authorities do not lay it down as an indispensable requisite, that the party should be sick, much less that he should be *in extremis*. The *Roman* law, as to testaments in regard to *personal* property, was early adopted in *England*. (*Harwood v. Goodright, Cowper*, 86. 90. 1 *Phillimore Rep.* 430.)

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Swinburne (87. part 1. s. 12.) says, "A nuncupative testament is, when the testator, without any writing, doth declare his will before a sufficient number of witnesses;" and he afterwards observes, (p. 88.) that "this kind of testament is commonly made when the testator is very sick," &c., but he does not appear to consider the sickness of the testator at all essential; nor does he make it a part of his definition of a nuncupative will. The civil law (*Harris's Just. Inst.* lib. 2. tit. 10. s. 14.) only required that a testament without writing should be made in the presence of seven witnesses; and from the note of Dr. *Harris*, it is evident that the only material alteration made by the statute in the common law of *England*, is by reducing the number of witnesses from seven to three. At common law, one witness, with attending circumstances, would have been sufficient; and it was the laxity of the rule, in this respect, that gave rise to the statute. Soldiers and seamen, while in actual service, may make nuncupative wills; but it will not be pretended that they must be *in extremis*. *Burns* (*Eccles. Law*, vol. 4. p. 107.) gives the same definition of a nuncupative will as *Swinburne*. He says, "A nuncupative testament is, when the testator, without any writing, doth declare his will, before a sufficient number of witnesses." He says nothing about the party being *in extremis*, or even sick; but proceeds to show what alterations had been made by the statute. *Wood* (*Inst.* 334.) gives the same definition. *Hargrave* (*Co. Litt.* 111. a. note 3.) considers the statute as prescribing a new rule, when it requires the testator to be in his *last sickness*. But can these words be tortured to mean that he should be *in extremis*? It is true, there are very few cases to be found applicable to this question. The case of Dr. *Shallmer's* will is stated by *Burns*, (*ubi supra*,) and in *Equity Cases Abridged*, (tit. *Wills*, B. pl. 2. p. 404.) It was decided in 1704, after *the statute; and it is fairly to be collected, from what is said by the lord chancellor, that our construction of the statute is correct. The doctrine of a continuance of intention, as stated from *Phillimore*, relates to *written* wills left unexecuted. A change or discontinuance of intention, is not to be inferred from mere silence, or inaction. There must be something positive and express, to destroy the idea of a continuance of intention of the testator, until his death. There is no proof that any means were made use of to prevent the testator from altering his will after it was declared. (3 *Swinburne*, 997. 999. part 7. s. 18.) If the testimony of *Ellen Taylor* is laid out of the case, the requisite number of witnesses will remain. The slight discrepancy between the witnesses, while testifying to the same facts, strengthens rather than weakens the force of the evidence. (*Paley's Ev. Christ.* 216.)

THE CHANCELLOR. The question to be discussed is, whether the nuncupative will of *William Jones*, as stated to have been made on the 11th of *April*, 1820, can be admitted to probate, as being valid in law. It becomes a complicated question, under the circumstances, and involves in the inquiry matter of fact, mixed with matter of law. I shall consider it to be my duty to

speak frankly and freely on the whole subject of the case, but, at the same time, with a sincere respect for the character of the court whose opinion is now under review, and from which I shall be obliged very greatly to dissent.

William Jones was an *Irishman* by birth, and a religious Catholic by profession. He was born in the county of *Dublin*, in *Ireland*, and received a school education about thirty years before his death, and which carries us back to the year 1790. He had then living parents, brothers and sisters, and he was the youngest of the family. He was apprenticed to a house-carpenter in the city of *Dublin*, and served a regular apprenticeship of seven years. When this service expired, he worked as a journeyman, for nine or twelve months, and then emigrated to the *United States*. This brings us, in the history of his life, to the year 1798, and perhaps that fact may enable us to give some probable solution of the only circumstance that seems (if we except *the will) to cast any shade over the memory of this man; I allude to the change of his paternal name, *O'Connor*, for that of *Jones*. It does not appear, precisely, when he changed his name, but I refer it back to that period, as the probable time, and presume that he and his family were more or less implicated in the peril of the rebellion, which broke out in *Ireland* in 1798, in consequence of an ill-fated attempt to effect a revolution in that kingdom. It is probable, that he may have emigrated for safety; and, for greater safety, laid down the name of *O'Connor*, which was then memorable in the *Irish* annals, on the side of the unfortunate. But, be this conjecture as it may, we find him first at *New-York*, then for two years at *Savannah*, then living, for 12 or 14 years, in the island of *Cuba*, and learning the *Spanish* language, and where he probably made his fortune. He is next traced, on his return to the *United States*, to the cities of *Baltimore*, *Philadelphia* and *New-York*; and in all of them, he seems to have had business, pecuniary concerns, and friends.

These are the few and imperfect sketches of his biography to be selected from the case, before we find him rich in the fruits of his enterprise, but sick with a disease of the liver, at the boarding-house of *Mrs. Fox*, in *Cherry street*, in *New-York*, the latter end of *March*, 1820.

Jones, while at the house of *Mrs. Fox*, claimed to be worth, altogether, 65,000 dollars, in property, existing in *New-York*, *Philadelphia*, *Baltimore*, and the island of *Cuba*; and to show that this claim had pretty fair pretensions to truth, there was actually found at his lodgings, at his death, bank books, showing deposits to his credit, in one or more banks of *New-York*, to between thirteen and fourteen thousand dollars.

He had been sick at *Mrs. Fox's* about five weeks, when he is said to have made the will now under consideration. During that time, he had one *Ellen Taylor*, a colored woman, for his hired nurse; and there was a *Mrs. Hazleton*, who had rooms, and boarded in the same house, who also acted as his nurse.

Whether *Jones* ever saw or heard of *Mrs. H.* before he came to board at *Mrs. Fox's*, does not appear, nor have we *in the case

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any distinct lineaments of the character which Mrs. *H.* sustains, or the business or purpose of her life. She rented the two front rooms in the boarding-house, and yet, her brother says, she followed no kind of business. She has had two husbands, and her present one is said to be a seafaring man, by one of her witnesses, and another of them says, that he had been voyages at sea, and had been on the gaol limits, and was then following his trade of a whitesmith at *Savannah*. Why she lives in this detached situation, without a family of her own, and a husband to live with and provide for her, as is quite common with married persons, must be left to conjecture. She was able, all at once, and, as it would seem, without any adequate cause, and without any remarkable display of goodness, or even of attention, to gain a wonderful ascendancy over the affections of this sick man. If her story be true, and the will genuine, she obliterated from *Jones's* breast the sense of friendship, the charities of religion, the deep-rooted traces of national affection, every tender recollection of the ties of blood, of his natal soil, of the school-fellows of his youth, of father and mother, brother and sister, relative and friend. He was persuaded at one nod, to pour the accumulated treasures of his varied life, into the lap of this mysterious woman—the acquaintance of a day!

The will, as certified by the four witnesses, is in these words: "I now say, as I have repeatedly said before, that I leave all the property I am possessed of to *Mary Hazleton*. I do this in consequence of the good treatment and kind attentions I have received from her during my sickness. She is worthy of it. No other person shall inherit my property. I wish you all in the room to take notice of this."

This will carries marks of *fraud on its very face*. Let us examine it attentively. This sweeping donation is made for what? *For good treatment and kind attentions received from her during his sickness*. The sickness had lasted only five weeks, and it was not so bad but that he was able occasionally to ride out. No person apprehended any immediate danger. He had a hired nurse, a colored woman, who was, by him, totally forgotten. What *could this other woman have possibly done, in the course of five weeks, to awaken, in any rational mind, a sense of such enormous obligation, or to call forth such stupendous remuneration? I am forcibly struck with the folly and falsehood of the motive assigned. But the will goes on, and adds, *She is worthy of it*; and where does her great merit appear, and from what circumstance does she entitle herself to this extravagant eulogy? The very declaration, that she was worthy to possess all his estate, proves, that *Jones* must have been insane, or that the whole is a base fabrication. The will goes on further, and says, *No other person shall inherit my property*. And why these words of special exclusion of the rest of the world? They seem to imply a heartlessness and misanthropy, very unnatural and very improbable for any man to express, in the contemplation of death, and who was in the enjoyment of the comforts and the smiles of fortune; and especially for a native born *Irishman*, who was in the midst of his emigrant countrymen, and could not but have heard and felt the claims of

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religion, of charity, of the widow and the orphan. He then adds, *I wish you all to take notice of this*;—a speech which looks so much like contrivance, that it does, of itself, throw a suspicion over the whole piece. This man must have been previously told, that the statute required, that in making a nuncupative will, the testator must *bid the persons present, to bear witness that such was his will*. It was made in the middle of the day, when he was quite comfortable, and far from the apprehension of death, and, in this respect, with all punctilious and technical adherence to forms. It had the requisite number of witnesses, and the address to the bystanders. Jones must have deliberately determined on a nuncupative, instead of a written will, and have previously known and studied all the circumstances that were requisite to make it valid, or else this will has been since got up for him, like a puppet-show, by the art and cunning of some juggler behind the scene.

[His honor here went minutely, and at large, into the examination of the testimony in the cause, and particularly of that of the four witnesses to the will, and observed, that from the nature, the improbabilities, the inconsistencies, and *the absurdity of the story, and the character and conduct of the witnesses, he drew the conclusion, that the testimony of those witnesses was utterly unworthy of credit, and that the will was evidently the production of fraud and perjury. After having disposed of the question of fact, his honor proceeded as follows:—]

But if we were to admit, against the truth of the fact, that the will of the 11th of *April* was actually and fairly made, according to the certificate of the four witnesses, it would then become a question of law whether it amounted to a valid nuncupative will.

A nuncupative will is defined by *Perkins*, (s. 476.) in his book, which was published under *Henry VIII.*, to be properly when the testator “*lieth languishing for fear of sudden death, dareth not to stay the writing of his testament, and, therefore, he prayeth his curate, and others, his neighbors, to bear witness of his last will, and declareth by word what his last will is.*” So, again, in *Swinburne*, (p. 32.) whose treatise was published in the time of King *James I.*, it is said, that this kind of testament is commonly made when the testator is *now very sick, weak, and past all hope of recovery*. I do not infer from these passages, that unwritten wills were always bad at common law, unless made in a case of extremity, when death was just overtaking the testator. In ignorant ages, there was no other way of making a will but by words or signs; reading was so rare an accomplishment in the earliest ages of the common law, that it conferred great privileges, and the person who possessed it was entitled, under the name of benefit of clergy, to an exemption from civil punishment. But these ancient writers mean to be understood, that in the ages of *Henry VIII.*, *Elizabeth*, and *James*, letters had become so generally cultivated, and reading and writing so widely diffused, that nuncupative wills were *properly*, according to *Perkins*, and *commonly*, according to *Swinburne*, confined to extreme cases, and to be justified only upon the plea of necessity. And this has been the uniform language of the *English* law writers from that time down to this day, so that it has become

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the acknowledged doctrine, that a nuncupative will is only to be tolerated when made *in extremis*. Thus in *Bacon's *Abridgment*, which was first published in 1736, and compiled chiefly from materials left by Lord Ch. B. Gilbert, a nuncupative will is taken from *Perkins*, and defined to be when a man is sick, and for fear that death, or want of memory or speech, should surprise him, that he should be prevented, if he stayed the writing of his testament, desires his neighbors and friends to bear witness of his will, and declares the same presently before them. (7 *Bac. Abr.* by Gwillim, 305.) The same definition is adopted by *Wood*, in his laborious work on conveyancing; (vol. 6. 574.) and in *Blackstone's Commentaries*, (vol. 2. 500, 501.) a nuncupative will is defined to be one declared by the testator *in extremis* before a sufficient number of witnesses. After reciting the substance of the provisions of the statute of 29 *Charles II.*, (and which we have reenacted,) he adds, "Thus has the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse, and hardly ever heard of, but in the only instance where favor ought to be shown to it—when the testator is surprised by sudden and violent sickness." And while I am citing so many *English* definitions of nuncupative wills, it cannot be thought useless, and will not be deemed unacceptable, that I should also refer to the very respectable opinion of the late chief justice of *Connecticut*, who declares, when speaking of nuncupative wills as understood in the *English* law, that they are allowed only in cases where, in extreme and dangerous sickness, the testator has neither time nor opportunity to make a written will. (1 *Swift's System*, 420.)

It appears to me, that these various writers must be satisfactory to every one, as to the true sense and meaning of a nuncupative will under the *English* law. It is not easy to recur to more accurate sources. The probate of wills being in *England* a matter of ecclesiastical cognizance, cases on that point rarely appear in the reports of decisions in the courts of common law. I have, however, been able to select two or three cases of nuncupative wills, which I shall submit to the consideration of the court.

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Coles v. Mordaunt (4 *Vesey*, 196, note.) was the case of a nuncupative will, in the 28th year of *Charles II.*, and *it is well worthy of notice, that this was only one year before the 29 *Charles II.*, when the statute relating to nuncupative wills was passed, and is said to be the principal case which gave rise to that statute. The case was this: Mr. *Cole*, at a very advanced age, married a young woman, who, during his life, did not conduct herself with propriety. After his death, she set up a nuncupative will, said to have been made *in extremis*, (for these are the words used in the report of the case,) and by which the whole estate was given to her, in opposition to a written will made three years before, giving 3,000 pounds to charitable uses. The nuncupative will was proved by nine witnesses, but the Court of Probates rejected the will, and on appeal to the delegates, a trial was had at the bar of the K. B., and it appeared, that most of the witnesses for the nuncupative will were perjured, and Mrs. *Cole* herself was guilty of sub-

ornation of perjury. It was upon the occasion of this shocking and foul conspiracy, that Lord Ch. *Nottingham* said, "he hoped to see one day a law, that no written will should ever be revoked but by writing." He was gratified in seeing such a law the succeeding year; and I will venture most respectfully to add, that if this nuncupative will be established, I should also hope to see one day a law, that no nuncupative will should be valid in any case.

The case I have cited contains a monitory lesson; and it very much resembles, in its principal features, the one before us.

In *Phillips v. The Parish of St. Clements, Danes*, (1 *Eq. Cas. Abr.* 401. pl. 2.) which was cited upon the argument, and arose in 1704, one Doctor *Shallmer*, by will, in writing, gave 200 pounds to the parish, and *Prew*, a reader in the church, coming to pray with him, he said, he gave 200 pounds more towards building the church, and died on the next day. This was a case of a nuncupative will, which only failed for want of three witnesses; but this testator was evidently *in extremis*. The particulars are not stated, except only that an officer of the church came to pray with him, and that he died the succeeding day; but those two circumstances well warrant the inference.

There is a very close analogy between these nuncupative *wills, and a gift upon the death-bed, or a *donatio causa mortis*; and these gifts are defined by the Court of Chancery in *Hedges v. Hedges*, (*Prec. in Ch.* 269. *Gilbert's Eq. Rep.* 12.) in the very terms of a proper nuncupative will. A *donatio causa mortis*, is where a man lies *in extremity*, or being surprised by sickness, and not having an opportunity of making his will, but lest he should die before he could make it, gives away personal property with his own hands. If he dies, it operates as a legacy. If he recovers, the property reverts to him.

Upon the strength of so much authority, I feel myself warranted in concluding, that a nuncupative will is not good, unless it be made by a testator when he is *in extremis*, or overtaken by sudden and violent sickness, and has not time or opportunity to make a written will. The statute of *Charles II.*, so often referred to, and which we have literally adopted, requires a nuncupative will to be made by a testator in his *last sickness*, and in his own dwelling-house, or where he had been previously resident for ten days, unless surprised by sickness on a journey, or from home. The last sickness, in the purview of the statute, has been always understood (for so I infer from the cases cited) to apply to the last extremity mentioned in the books, and it never was meant to uphold these wills, made when there was no immediate apprehension of death, and no inability to reduce the will to writing. A case of necessity is the only case, according to *Blackstone*, in which any favor ought to be shown them. If they are alleged to have been made in a case unaccompanied with necessity, the presumption of fraud attaches to the very allegation. Let us suppose, by way of illustration, the instance of a person gradually declining under the operation of some slow paced disease, as the affection of the liver, or the consumption of the lungs, or the dropsy, or the cancer. The patient is, himself, we will suppose, under no

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immediate apprehension of death, nor is any such alarm excited in others. He is comfortably seated in his chamber, in the midst of a populous city, and with ample means to command every kind of assistance. He has had a fair common education, and knows well how to read and write. He has been a man of good understanding, *habits of business, and of successful enterprise, and has accumulated a fortune. He is well versed in the knowledge, and in the affairs of mankind. He has pen, ink and paper at hand, with an adroit physician at his elbow, and a favorite friend at his side, on whom he wishes to bestow his fortune. He is in the middle of life, with his intellects perfectly sound; he proposes, or it is proposed to him, to make his will. Would such a man, in such a case, ever dream of making a nuncupative will? Would any honest or discreet friend ever advise him to it? If that should be his wish, or if that should be the suggestion of others, would the law tolerate such an indulgence, under the notion that he was in his last sickness? Surely the good sense of the law, as the books explain that law, and the cautious and jealous provisions of the statute of frauds, never intended a nuncupative will for such an occasion. The law wisely discriminates between written and unwritten wills, and permits the latter only in cases of urgent necessity. To abolish that distinction would be to abolish protection to property, to encourage frauds and perjuries, and to throw us back upon the usages of the unlettered ages.

If nuncupative wills can be permitted at all, in the cases of chronic disorders, which make silent and slow, but sure and fatal approaches, it is only in the very last stage and extremity of them. In no other period can such a disorder be deemed, within any reasonable construction of the statute of frauds, a man's *last sickness*. Such diseases continue for months, and sometimes for years. In one of Captain *Cook's* voyages, he states, that he lost his first lieutenant, Mr. *Hicks*, near the conclusion of the voyage of three years, and almost within sight of the *English* coast. But, he adds, that as his disease was the consumption, and as it existed when he left *England*, it might be truly said, that he was dying during the whole voyage. What would the law call that man's last sickness? Not the whole voyage surely, and, probably, it would be narrowed down to the last day, and to the last hour of his existence. We must give a reasonable interpretation to the statute, in reference to the mischief, and to the remedy. We cannot safely apply a man's last sickness to the whole continuance of a protracted *disease, without giving to the statute an absurd construction. I do, therefore, most confidently insist, that *Jones* was not in this last sickness on the 11th of *April*, within the sense, or within the policy of the statute, and that he was not then entitled to make a nuncupative will.

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There is one other consideration that imparts to this subject of nuncupative wills, a momentous character, and ought to incline us to give to them as little countenance as possible. As soon as a nuncupative will is made, it becomes the interest of the legatee that the party's sickness should prove to be his *last sickness*; for if he recovers, the will, of course, falls to the ground. Not so

with a written will. That remains good until revoked, and it cannot be revoked but by writing. Let us, for one moment, pause over this consequence of nuncupative wills, and observe with what a deleterious influence they must suddenly act upon the heart, and what a powerful appeal they at once make to the selfish and dark passions of the human mind. The title of the legatee depends altogether upon the precipitate death of the testator. Every day that his life is prolonged, more and more impairs the character of the will, and it vanishes if he becomes convalescent. Suppose the testator was understood to possess a large amount of cash in hand, and that he gives it all, by a nuncupative will, to a stranger, to whom the law would not have given it. Suppose that stranger to be his physician, or as, in the present case, his nurse, what hold has the testator on her fidelity, her kindness, or her integrity? Her interest and her wishes (if indeed her wishes procured the will) must be to destroy, and not to heal her benefactor. The legacy operates as a bounty upon his death. One cannot contemplate a nuncupative will under this aspect, without sensations of horror. Well might such a man exclaim, as *Jones* is said to have done, repeatedly, "*My life depends upon that woman.*"

I am accordingly of opinion, both upon the law, and upon the fact, that the decree of the Court of Probates, directing the nuncupative will of *William Jones* to be admitted to probate, was erroneous, and ought to be reversed; and that the decree of the surrogate of the city and county of *New-York*, *of the 17th October, 1820, directing the application to admit the said nuncupative will to probate to be dismissed, and that letters of administration, of the goods, chattels and credits, which were of *William Jones*, deceased, be granted and issued, according to law, as in cases of intestates, be confirmed.

SPENCER, Ch. J., said, that he concurred in opinion with the chancellor, that the decree of the Court of Probates ought to be reversed, on the ground, that the alleged nuncupative will was not made while the testator was *in extremis*; and because it appeared, from all the evidence in the case, that when the alleged will was made, he did not think himself, nor did any other person think him to be in any immediate danger of dying; and because there was ample opportunity to make a will in writing, had the supposed testator been so disposed.

PLATT, J., said, that he fully concurred in the opinion of the chancellor, both on the law and the fact.

WOODWORTH, J. This case comes before the court on an appeal from the decree of the Court of Probates, by which it is adjudged, that the nuncupative will of *William Jones*, deceased, having been duly proved, be admitted to probate, and that letters of administration, with the will annexed, be issued thereon.

I will examine this cause in the following order:—

1. What are the facts necessary to constitute a valid nuncupative will?

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2. Does the testimony satisfactorily prove the making of such will?

The act concerning wills, declares, "*that no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of 75 dollars, unless the same be proved by the oaths of three witnesses, at the least, who were present at the making thereof; nor unless it be proved, that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or words to that effect; nor unless such nuncupative will be made in the time of the last sickness of the deceased, and in his dwelling-house, or where he had been resident for ten days or more, next before the making of such will, except where such person was surprised or taken sick from home, and died before his return to the same.*" By the 15th section, it is declared, "*that after six months from the speaking of the pretended testamentary words, no testimony shall be received to prove any nuncupative will, except the same testimony, or the substance thereof, was committed to writing, within six days after the making of the said will.*"

The requisitions of this act must be satisfied; there is such perfect perspicuity in the language made use of, that if doubts existed as to the law, previous to the passing of the act, none can remain at the present day. If the statute is so plain, as to be incapable of misconstruction, then, without reference to the law previously in force, it must be carried into effect, according to the intention of the legislature. If it gives a new rule, that rule must be observed. In such cases, no consequences are to be regarded in the construction. (6 Bac. Abr. 392.) On the other hand, if a statute makes use of words, the meaning of which are well known at the common law, the words shall be understood in the same sense; and hence it frequently becomes necessary to know, what the common law was before, and what the mischief was, for which the common law had not provided. These general remarks may be considered not inapplicable, in examining the soundness of the legal objections made by the appellant's counsel. It is contended, that, admitting the respondents' witnesses have testified truly, they do not make out a case within the act. The objections are, first, that "*last sickness*" means sudden illness, when the testator is *in extremis*, and in the immediate prospect of death; and, secondly, that the will is void, because no executor is named. To guard against impositions and forgeries, in setting up nuncupative wills, the statute was passed, and has imposed several salutary restrictions. In discussing the first objection, it will be useful to inquire, how the law stood before the passing of the act. If we can ascertain the common law exposition of "*last sickness*," I admit it will go far to show how the statute is to be understood. If no light can be derived from the common law in explaining these terms, then the words "*last sickness*," in the statute, are to be construed according to their obvious import, which is, the sickness immediately preceding the death of the testator, without reference to any precise period of the disease, or any particular apprehensions the testator may be under, as to his approaching dissolution.

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The doctrine in relation to nuncupative wills is derived from the civil law, and is of very ancient date. (*Cowp.* 90.) It was incorporated into the system of the common law, and acted upon, *proprio vigore*, long before the statute of frauds, and the statute of wills, as will be shown in the course of this inquiry.

In the institutes of *Justinian*, (lib. 2. tit. 10. sec. 14.) it is laid down, "If a man wishes to dispose of his effects, by a nuncupative or unwritten testament, he may do so, if, in the presence of seven witnesses, he verbally declares his will; and this will be a valid testament, according to the civil law." It seems, that neither last sickness, nor any sickness, was necessary to give it validity; it was sufficient, if the witnesses, within a reasonable time after the death of the testator, went before a magistrate, and giving an account of what took place, a formal statement was drawn up and signed. *Swinburne* (part 4. sec. 29. p. 350.) says, "In making a nuncupative will, this is chiefly to be observed, that the testator do name his executor, and declare his mind by word of mouth, without writing, before witnesses; no precise form of words is required, so that the testator's meaning do appear." So, also, in *Swinburne*, (part 1. sec. 12. p. 58.) it is said, "A nuncupative testament, is when the testator, without any writing, doth declare his will before a sufficient number of witnesses. It is called nuncupative, because, when a man makes such a testament, he must name his executor, and declare his whole mind before witnesses." The author then observes, "This kind of testament is commonly made when the testator is very sick, weak, and past all hope of recovery." Here, I think, we may discover the source of that erroneous impression, which some elementary writers entertain, that it is of the essence of a nuncupative will, that it be made *in extremis*, or when a man is sick and in fear of death. *Swinburne*, who, in substance, lays down *the same rule, in respect to nuncupative wills, as that sanctioned by the civil law, does not give the least countenance to the notion, that sickness is at all necessary. He merely states the times when these wills are generally made, not that any particular time, or any sickness is necessary. He had before shown it was not; but he evidently introduces it, in order to give the reason why men defer a business of such importance to so late a period. He observes, "It is a received opinion, amongst the ruder and more ignorant people, that if a man should be so wise as to make a will in health, that then surely he should not live long after, and therefore they defer it until a time of sickness." (p. 59.) From the preceding authorities, it is obvious, that before the statute the validity of a nuncupative will did not depend on the fact that it was made in the last sickness. *Blackstone*, who is supposed, by the appellant's counsel to hold a different language, will, I think, on examination, be found not to contain any thing in opposition to the preceding authorities. In 2 *Com.* 500. the author very concisely remarks, "that a nuncupative will depends merely upon oral evidence, being declared by the testator *in extremis*, before a sufficient number of witnesses, and afterwards reduced to writing." He nowhere says that it is necessary to be made *in extremis*; the reference is obviously to the time generally chosen for the making

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of such wills, "being declared by the testator *in extremis*;" which, as a general proposition, is undoubtedly true. He evidently intended to state this fact, as *Swinburne* had done. If the doctrine, derived from the civil law, was intended to be questioned, this accurate writer would have given some intimation, from which such a conclusion might fairly be drawn.

In 7 *Bacon*, (tit. *Wills*, D. 305.) the author, speaking of nuncupative wills, gives this definition: "When a man is sick, and for fear of death, or want of memory should surprise him, if he stayed the writing of his testament, desires his neighbors and friends to bear witness of his last will, and then declares the same presently by word, this is called a nuncupative will." There is no doubt this is all correct. A will made under such circumstances would be valid; but it will be remembered, that the question is, whether a will *would not *also be valid*, if not made in sickness, and for fear of death. *Bacon* does not assert that it would not. We must, therefore, suppose, that in speaking of such will, he had in view, that nuncupative wills are generally made under the circumstances he describes; and that he meant only to say, that such wills were good. The authorities he cites (1 *Inst.* 111. and *Perkins*, 209. sec. 476.) do not contradict the rule of the civil law, nor state any thing in opposition to the doctrine laid down in *Swinburne*.

As further evidence, if any is wanting, that *Bacon* so understood the law, we find, in a case (7 *Bac.* 339. tit. *Wills.* 1 *Eq. Cas. Abr.* 403.) where a question arose as to the validity of a nuncupative will, it is merely stated, *that the testator was ill*. No objection was taken on this point, but there were other difficulties, which, if they had been removed the will would have been good. I will not trespass on the patience of the court by pursuing this inquiry further. I think it is perfectly settled, that before the statute, a good nuncupative will might be made at any time, if proved by witnesses, and, although, for reasons already given, men generally deferred the making of such wills, until overtaken by sickness and in fear of death; yet that the law did not place wills, made at such times, on more favored grounds than if made at a different period. The consequence, then, is, that there is nothing in the common law to aid in giving a construction to the terms "last sickness," made use of in the statute; and, therefore, the statute must be considered as introducing a new rule, or, perhaps, more correctly speaking, restricting the period in which nuncupative wills may be made, by confining it to "last sickness," instead of leaving the time in the discretion of the testator. If any thing more was necessary to prove the soundness of the doctrine I have advanced, it seems to me the statute itself contains the most satisfactory evidence. It is admitted, that the statute was intended as a remedy for the frauds and impositions which grew out of the common law. The various regulations introduced, were for the express purpose of serving as checks and barriers against fraud. The statute does not purport to be declaratory of the common law, but is a *remedial statute. The period in which a valid nuncupative will might be made, was no longer to remain in the discretion of the testator; but as offering less opportunity for imposition, the statute confined it to his

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"last sickness." That requisite was inserted, because the common law had not provided any such restriction. *Blackstone* observes, (vol. 2. p. 501.) in commenting on this statute, "It must be in the testator's last sickness; for if he recovers, he may alter his dispositions, and has time to make a written will." The inference drawn from the statute is in coincidence with the doctrine derived from the common law.

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But it is said, that this will is not valid, because no executor is expressly appointed. Without examining whether the naming an executor was essential to every testament, it is sufficient to show that an executor, *eo nomine*, need not be named in words.

Swinburne (part 4. sec. 4. p. 247.) observes, "If the testator says, I commit all my goods to the disposition of *A. B.*, it is, in effect, as if he says, I make him my executor, for it thereby appears he did not intend to die intestate." Here, the testator has given all his personal estate, and that is a valid appointment of executor. I apprehend, that in every case, a nuncupative will may be valid without naming an executor. In 2 *Black. Rep.* 503. the author states the proposition generally, that if the testator makes an incomplete will, without naming an executor, administration may be granted *cum testamento annexo*. (1 *Roll. Abr.* 907. *Comb.* 20.) This appears to have been done in several cases. In *How v. Godfrey*, (*Finch's Rep.* 361.) letters of administration, with the will annexed, appear to have been granted on a nuncupative will when no executor had been appointed. The long and uniform practice in this respect, is opposed to the objections urged, that the appointment of an executor, in the will, is essential.

Some criticisms were applied to the testimony of the witnesses who proved the will, which I will briefly notice; it is objected to Doctor *Arden's* testimony, that after stating the expressions of the testator, he says, "or words to that effect." That *Waters* uses the words, "should have all the *property he was worth;" and *Ellen Taylor*, that "all that he had or was possessed of, was for Mrs. *Hazleton*." I have already shown that no precise form of words are required by law:—if the intent and meaning can be collected, that is sufficient. *Swinburne* lays this down expressly. I have not discovered any rule of law opposed to it. Indeed, so long as nuncupative wills are allowed, no other rule would be applicable to the subject. We need not be informed that no witness could be relied on, as to every identical word made use of by the testator. All that can be expected is to give the substance. No doubt, very nearly, the same words used by the testator may be retained; and when a witness testifies to the expressions, we understand him, that the words so testified to, convey accurately the meaning of the testator, but no one would consider the witness as speaking technically in "*hæc verba*." There is no force, then, in these objections, provided the words proved by the witnesses show the meaning of the testator. If the testimony in this case is true, the words abundantly prove the intent, that Mrs. *Hazleton* should, after the testator's death, have all his property.

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The remaining question is, Does the testimony satisfactorily prove that the will in question was made?

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It does not appear to me extraordinary, that this question has been litigated with uncommon zeal; neither ought it to excite surprise, to find contradictory testimony in some material points. It was to be expected; it is an angry controversy, where disappointment on one side, and the hope of establishing the will on the other, have excited great competition. Here is a foreigner with considerable property, about to leave it soon. Whether he has any heirs in his native country is uncertain; he thought he had none; if he had, it is very evident he felt no sympathies or interest for them; all connection seemed to be dissolved; years had passed away without any communication; he had changed his name; in short, whatever may have been the cause, it does not appear, that a single human being had any hold on his affections, so as to be a particular object of his bounty. In this situation, he is confined by sickness, and although he entertained hopes of recovery, it cannot be doubted, he *must have had strong apprehensions that his end was near. I think it quite evident he was not disposed to make a written will.

The formal act of dictating a written will, may have appeared too much like the precursor of dissolution; or his apathy might be such, that he would not go through the formalities of so solemn an act, and yet might be willing to say, "*A. or B. shall possess my property after my death.*" He might have a predilection enough for some individual, to do the latter, for it was attended with no trouble or effort, but would have died intestate, rather than submit to the former. Who can point out, with certainty, the object of his regard? He was eccentric, of singular habits; fretful, suffering at times excruciating pains. Is there an individual that will pretend to such knowledge of the human heart, the motives and springs of human action, as to say, that the faithful attendant on the sick bed of the testator, who had devoted days and nights to mitigate his sufferings and soothe his pains, would not probably be deemed a fit object of his bounty? For myself, under such circumstances, I have no hesitation in saying, such a disposition of his property is at once natural, if not to be expected. If the result of this examination shall be, to prove the making of a will, this court, sitting to discharge the duty of discreet jurors, will not erect itself into a tribunal to say, the testator ought not to have devised in this manner; neither will it feel itself at liberty to disregard the testimony in support of it, unless it shall be successfully impeached, according to the rules which govern in a court of justice.

Four witnesses have been examined to prove the will. If they, or any three of them, are to be regarded as credible witnesses, it is abundantly proved. I shall begin with Doctor *Arden*. His general character is not impeached. I cannot travel out of the case to inquire respecting him; I think it will be admitted, if aught could be alleged against him, it would not have been withheld. I am constrained to believe he has stated the truth, unless it be shown that his evidence is contradicted in material parts. He not only swears to the making this nuncupative will, but that on several occasions, previously, the testator declared his intention

to *give all his property to Mrs. *Hazleton*; and subsequently declared *he had* given to her all his property. If this man is perjured, his depravity must be confirmed and settled. In the complication of testimony, nothing has transpired to assign a motive or inducement for such a course; no connection or intimacy is traced between him and the respondents. Before he is consigned to infamy, he has a right to demand the evidence upon which his criminality is founded. I have sought for it in vain, and, therefore, am bound to believe him.

But it is urged, that his testimony is contradicted. He says, he was called to *Jones* as a patient, by finding a memorandum on his slate, by some person, but what person he never knew: is this disproved? So far from it, *Taber*, an unimpeached witness, says, that a man did call at the office of Doctor *Arden*, and left a message on the slate for him. *James M'Donnell* testifies, that it was proposed by *Jones* and Mrs. *H.* that he should go to Doctor *Arden*; that he went, saw him, and delivered his message. In all this, I perceive no contradiction; the testimony is consistent and reconcilable; the fact, that *Arden* was called by a message on the slate is proved to be true. Some person did call, and as *M'Donnell* appears to have been the only person sent, and inasmuch as he has not denied that he left that message, nor been questioned respecting it, as might have been done, had it been deemed material, the fair presumption is, that he was the man that called, and not finding *Arden* at home, afterwards saw him, and delivered the message personally. But whether he was the person or not, is immaterial; *M'Donnell's* request does not, in the least, falsify the statement of *Arden*, that a message was left on the slate; both are undoubtedly true, and admit of perfect explanation. That he was sent for, and at the request of *Jones*, is proved. It is difficult to conceive, why this unimportant circumstance was pressed, as a ground for impeaching the testimony. Another ground is this: *Arden* says, he never heard any friend, visitor, or attendant, make a request to call in a clergyman. *Julia Devoy* testifies, that she urged to Doctor *Arden* the calling in of the bishop; that the doctor observed, that he should allow no clergyman to come that night. Here is contradictory *testimony, not as to the fact whether a will was made, but in relation to the solicitude expressed by Mrs. *Devoy*, for the spiritual concerns of the testator. This is the only contradiction I have discovered in *Arden's* testimony; and it admits of a satisfactory answer. Allowing Mrs. *Devoy* to be an unimpeached witness, which I think will be shown she is not, then, is the evidence of *Arden* falsified by her? It is not, by any rule of evidence with which I am acquainted. In case the request to send for the bishop was a material fact for the respondents to make out, I admit the evidence would be neutralized, and go for nothing, because the affirmative must be made out by a superior weight of testimony, and as the scales are balanced, the affirmative is not established; but no inference can rightfully be drawn, that the testimony of *Arden* was false, although it may be evident that the testimony of one or the other was necessarily so. If both witnesses stand unimpeached, independent of

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the fact that they disagree as to a particular thing, the scales are in equilibrio, and other things being equal, they are each entitled to credit. I put this in the strongest point of view for the appellant, and it will not aid him, for there is as much reason to believe Doctor *Arden* as Mrs. *Julia Devoy*. But is it consistent with the rules of interpreting and reconciling testimony, to push the doctrine thus far? Does not the experience of every member of this court attest to the truth of the proposition, that memory is frail, that misapprehension and mistake are incident to man, that the law will charitably attribute discrepancies in testimony to some of these causes, rather than to deliberate perjury, if, from the nature of the case, there may have been forgetfulness or mistake? Who that is conversant in courts, does not know, that it is of every day's occurrence, for credible and intelligent witnesses to take a different view of some circumstances in the same transaction, and if called upon to testify, may, in some unimportant particulars, at least, contradict one another? Would the duty of a judge, for such cause, require him to instruct the jury to disregard it? I apprehend not. I have supposed the case, in the remarks that I have made, that Doctor *Arden* and Mrs. *Devoy* were equally credible. The further examination of this cause will, I think, show how little she is *entitled to such a character. *Arden*, then, has passed the ordeal unhurt, and proves that *Jones* made a will. The next witness is *George Waters*; his testimony is substantially the same as *Arden's*; his attendance was unsolicited and accidental; he had never seen *William Lee*, another of the witnesses, before the 11th *April*, when he met him at *Jones's* room. The testimony of this witness fully proves the will; it is not impeached, and is entitled to credit.

The next witness is *William Lee*; he also proves the will. He says he was requested by Doctor *Arden* to go with him to see a sick patient; he went; he never saw Mrs. *H.* until he met her at the house where *Jones* was lying sick. His testimony, in substance, concurs with that of *Arden* and *Waters*; but it is assailed on several grounds. I will briefly consider them. *Lee* says, that on the third of *May*, Mrs. *H.* called on him, and gave him the first information of *Jones's* decease. *Walter Furlong* testifies, that he informed *Lee* of the decease of *Jones*, the morning he died. Whether *Lee* received the information on the 15th of *April*, or the 3d of *May*, is a circumstance irrelevant and unimportant, in respect to the subject of this will; it could have no effect whatever, allowing that the witness intended to aid the cause of Mrs. *H.* If *Lee* was corrupt enough to sacrifice his integrity, he would have testified falsely to some fact that might be material. It would be in character, for a knave, on prudential grounds, to adhere to truth in circumstances of no moment; he would not expose himself to contradiction where nothing could be gained. I perceive no motive for stating the time of receiving information falsely. The law will not impute perjury on such a state of facts, but will ascribe the variance to misapprehension or mistake; besides, *Lee*, who swears to one day, is equally credible as *Furlong*, who swears to another.

If this was an ordinary case, before a jury, exciting but little

interest, I am persuaded the contradiction, merely as to the time when notice of *Jones's* death was received, would not be seriously urged; if it was, it would not, and ought not to be listened to.

But, it is urged, that *Lee's* general character is impeached. It is proper here to remark, that evidence of this kind, *although admissible, is to be critically examined, and very deliberately considered, before it is acted on. When a witness testifies, that the general character of another is bad, and goes no further, it cannot be satisfactory; for that would subject the character of an individual to the opinion of the witness, and not to the general sense of the community, respecting the person sought to be impeached; hence it becomes necessary, and is always competent, to inquire, whether the community generally, or a few individuals, speak ill of the person implicated, and whether such persons may not have been biassed by prejudices of whatever kind, and whether they have not had some disagreement, controversy or quarrel. The weight that such evidence is entitled to, will depend on considerations like the preceding, and others of a similar nature.

It is what the community say generally of a man, that is evidence; not what this or that individual may say. Deplorable, indeed, would be the state of society, if the opinions of two or three individuals should be deemed sufficient to establish a general bad reputation. In times of party contention, if not at all times, it would not be difficult to prove, in any given case, that a few individuals had spoken against the character of the witness, or person on trial, when the general voice was otherwise. It is not evidence at all, where the witness who impeaches another has formed his opinion merely on what *A.*, *B.* and *C.* have informed him. If the witness has only heard *A.* and *B.* speak of the individual implicated, then he is not sufficiently informed to make out what is required, and the party who calls him must resort elsewhere. On principle, it is highly expedient the law should be so; for this species of evidence deals in no specific facts, and consequently, no investigation can take place as to the truth or falsehood of the matters which have made an unfavorable impression against a witness; all that can be done is to give evidence of general good character. The proceedings in our courts of justice show, that evidence to impeach, or support, is obtained without apparent difficulty; it is not conclusive in any case, but is powerful and operative, when the general sense of those acquainted with a witness, is unfavorable to his truth *and integrity. The law has considered character sufficiently guarded, by allowing it to be assailed only when the general opinion was against it. General opinion raises a strong presumption that there are facts to support its justice and correctness; but the opinion of this or that individual, raises no such presumption.

The preceding remarks apply to the testimony introduced to impeach *William Lee*. The first witness, *Pensford*, says, his general reputation is bad, but admits that he never heard more than two or three persons speak ill of him. Will this satisfy the rule of law that the general character is bad? I think not.

Gross swears, that he would not believe him on oath, and has

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heard from a number of persons that he was a bad man. *Carter* says, that *Lee's* character, for truth and integrity, is not good; and that he is not entitled to be believed as a witness.

This is the evidence for the appellant.

The respondents have resorted to the same kind of evidence to support *William Lee*, in which they have succeeded. Nine witnesses testify favorably of his character; and that he is to be believed on oath. There is a variation in the forms of these depositions; some are more full and explicit than others. I have considered the criticisms applied by the counsel on the argument. When a witness says, that "from the general character of *William Lee*, for truth and integrity, he would believe him on oath as a witness," I cannot intend that his character is presented in a questionable shape; that the witness meant to say, he has just so much character as will entitle him to belief, and nothing more; and by using such terms, to present the witness as suspicious. The fair import is decidedly in support of a good reputation for truth and veracity. But *West*, *Johnson* and *Quin* speak in more general terms; they know his general character, for truth and veracity, to be good. *They alone* are more than sufficient to counterbalance the evidence of *Gross* and *Carter*, on whom the appellant most relies. This attempt has failed altogether. Has *Furlong* proved any fact injurious to the credit of *Lee*? How this deposition can be made to bear on the truth of *Lee*, I confess I am ignorant.

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*If *Lee* was under any obligation to disclose to his journeyman, *Furlong*, what he knew respecting *Jones's* will or property, this deposition would, indeed, prove he had not done so, and for which *Furlong* might complain; but admitting the obligation to gratify the curiosity or inquisitiveness of *Furlong*, how does it affect *Lee's* truth? To attempt to prove that it does not, would be a waste of time. As a specimen, take the following: *Furlong* says, *Jones* died without making a will; *Lee* replies, "It was a great pity." *Lee* inquired where *Jones* lived, and whether *Furlong* knew how the property would be disposed of; that it was a great pity it should fall to the state, and not go to his relations in *Ireland*. Such are the opinions expressed by *Lee*, and such the manner of his conversation with *Furlong*.

No principle of morals or ethics, required *Lee* to state all he knew; he was at perfect liberty to communicate his knowledge, or remain silent; and if, by his manner, *Furlong* drew an inference of *Lee's* ignorance on the subject, I am not aware of any impropriety, much less that any criminality attached upon his conduct. He was bound to speak truth, when he did speak; but he was not prohibited from making inquiries, or expressing regrets.

Furlong had no interest in, or connection with, the will, or the parties to it, and could sustain no injury by remaining in ignorance. *Lee* acted with prudence, and proper reserve. When inquired of how he could be a witness, he gives a satisfactory explanation; "he did not think proper to inform *Furlong* what he knew."

Thus, have I examined the testimony of three witnesses in support of this will, with the various objections to their credibility, and arrive at a conclusion entirely satisfactory to my own mind, that a nuncupative will was fairly and *bona fide* made, answering all the requirements of law, and vesting in the respondents the property of the testator.

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With respect to *Ellen Taylor*; the aid of her testimony is not required. It is admitted, that she is contradicted in so many particulars, that, unless supported, she is not entitled to credit. She is a woman of color, who attended *Jones* in his sickness, and, probably, of that class who are not under *the control of moral restraints. Any number of witnesses, impeached as she is, would not be sufficient to establish a fact. It does not, however, follow, of necessity, that she has not testified truly as to this will. If two credible witnesses proved the fact, and she is called as a third witness, will it not satisfy the words of the statute? It is well known, that the unsupported evidence of an accomplice, is held not sufficient to convict; but if that accomplice derives support as to some of the material facts, it will warrant a conviction. The statute requires the will to be proved by three witnesses. Does it place the testimony on different ground from a case where witnesses are called to prove any other fact? Does it deny the aid in support of a witness that would be admissible in other cases? May not such aid be derived from the same sources? I perceive no objection in the letter or spirit of the act. If, in an ordinary case, she had been called as a witness, and had proved a material fact, and the opposite party, as in the present case, had shown so many contradictions as to discredit her, the introduction of two other witnesses, swearing to the same material fact, would restore her credit in the particular instance; and, according to the settled rules of evidence, it could not be said she was not, on that occasion, a credible witness. It is true, her testimony, in that case, would not become indispensable, because the same thing was proved by others; but, on the question, whether she had sworn truly, it must be answered in the affirmative. Apply this principle to the present case. She is a competent witness; the objections go to her credit. If her credit is restored, is it material by what witnesses that is effected? If two credible witnesses prove the same fact, and that *Ellen Taylor* was also present, and heard what was said, where is the principle of reason or law, that will not allow her testimony to be corroborated and supported on such grounds? The statute has not interposed any such barrier. It speaks not of credible witnesses generally, but of three witnesses, against whose competency there is no valid objection. When such are produced, I apprehend the fact is to be made out by the three; and that, from all the evidence before the court, the question is, whether each witness has testified truly.

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*To illustrate the principle I have laid down, I will suppose that *Jones* made his will in the presence of two honorable members of this court, whose testimony was above all exception, and that *Ellen Taylor* was also present, and no other person. Would all this evidence be rejected, because *Ellen Taylor* was discredited

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as to collateral facts? Would not the result be, that thus supported, she is to be believed; and, therefore, the will is well proved? Such are my views on this point, and such would be my conclusion, were it necessary to decide the point.

I will now examine the assemblage of circumstances, evidently got up at the instigation of *Devoy* and his wife, influenced, as appears to me, by the consideration that as they had been disappointed in obtaining a will, to defeat Mrs. *H.* in her claim would afford the only chance of reaping a portion of the spoil; trusting to the gratitude of *Jones's* relations, if he had any, or, in the words of *Devoy*, "that he would leave that to their own generosity."

The testimony remaining to be examined is not immediately directed against the witnesses, on whom the respondents rely; but to render it improbable a will was made, by proving the conduct and declarations of *Jones* and Mrs. *H.*, *Patrick Devoy* testified, that he never said any thing to *Jones* about making his will, nor did he mention that subject himself, nor did any person mention the subject in his hearing; that Doctor *Torbert* informed him (*Devoy*) that a will must be prepared, and submitted to *Jones* and his clergyman, to be signed, if *Jones* liked it. *Devoy* admits he said to *Torbert*, that a will, dividing the property of the deceased equally among his friends would be satisfactory; but that he never gave *Torbert* any directions, *that he was to have a share of the property.* Here, then, we find *Devoy* active in procuring a will, without ever having consulted the testator, or, by his own account, ever having received the least intimation that *Jones* intended to give him any thing. This alone places him in a suspicious point of view. But Doctor *Torbert* contradicts him; he says he went, at the request of *Devoy*, to see if he could not make *Jones's* will; "*that the provisions thereof were made known to him by Patrick Devoy;*" and that "*Devoy* was named as an heir or legatee in the *will he had written." That Mrs. *H.* did not feel disposed to aid this man in seizing on his prey, cannot be doubted; nor but that she was justifiable in endeavoring to divert him from his purpose by all lawful means. She had much to apprehend from such a combination. Her anxiety may have induced her to say more than was consistent with truth. If she has done so, it must be remembered that she is not a witness in this cause; the validity of the will cannot depend on her subsequent declarations, made with a view to guard what she had obtained, and prevent its being wrested from her. *Torbert* inquires, whether *Jones* had made a will; she answers no; that when the subject is mentioned, it puts him crazy. As to the first, she may have considered the answer strictly true, as there was no written will. It seems that Mrs. *Newkirk*, an unsuspected witness, informed the surrogate, that she knew nothing about a will, and in explanation says, she had reference to a written will. As to the latter, it will be recollected, that this was the day preceding *Jones's* death; and no witness has testified that the declaration was untrue at the time it was made; she may have had reference to his then state, which was but a few hours before his death. This may all be

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true; for although *Fleury* conversed with *Jones* about making a will, when he discovered no particular agitation, that was several days previous, and does not necessarily contradict what *Mrs. H.* stated to Doctor *Torbert*. Again, *Devoy* says, he and *Mullen* remained with *Jones*, on the night of his decease; that about midnight *Jones* called him to his bedside, and directed *Mrs. H.* to leave the room; that she went and sat down by the foot of the bed; that he then inquired whether she was gone; and being answered, No, *Jones* then ordered her to leave the room, and, after she had left it, directed *Devoy* to put a ketch on the door, which he did; that *Jones* then inquired who was there; and being informed it was *Mullen*, he was satisfied. That *Jones* then said, he would be removed in the morning to *Devoy's*, that the bishop should be brought, and he would settle his affairs; that he ordered *Devoy* to ring the bell, and get the keys from *Mrs. H.*, having first inquired if *he* had his keys; that he then began to talk of his property, complained that *Mrs. H.* neglected him, carried his liquor up stairs, and that she and *another woman got drunk; and that, shortly after, he expired. This story, on the face of it, is incredible; if not, it evidently shows, that *Jones* was deranged. It is so extravagant and improbable as to discredit itself; but it is refuted. *Taber* testifies, that he remained with *Jones* on Sunday night, until 2 o'clock in the morning; that the man who sat up with him (meaning *Mullen*) was drunk; that he and *Devoy* drank freely of spiritous liquor, and that *Devoy* was also affected by the liquor he drank. He further testified, that he was awake all the time, and did not hear *Jones* find any fault with *Mrs. Hazleton*; that *Mrs. H.* went to bed about one o'clock, at *Taber's* request. Even *Mullen* does not countenance the statement; he did not hear *Jones* say any thing about removing to the house of *Devoy*. Sitting as a juror, to decide dispassionately on facts, I should consider this story of *Devoy* an entire fabrication; besides, if there is any one fact clearly proved, it is, that *Mrs. H.* was a kind, faithful and attentive nurse, and it was so admitted by *Jones*, repeatedly. On Saturday evening, *Taber* says, *Jones* informed him he had given *Mrs. H.* all his property; that the conversation was loud, and could be heard in every part of the room. *M'Donnel* testifies, that *Jones* said, *Mrs. H.* was a fine clever woman; to *Mrs. Newkirk* he said, he had trusted all, and his life, in her hands. *Edward Polleck* says, that *Mrs. H.* paid very strict and constant attention to *Jones* during his illness; that *Jones* seemed grateful for her services; that she was one of the best nurses he had ever seen or known, in her attentions to *Jones*. More need not be said, to show that *Devoy* is entirely unworthy of credit.

As to Doctor *Torbert's* testimony, I have already remarked on that part which seems to have been intended to make against this will. It has but a slight bearing on the question in controversy, and might have been withheld without injury to the appellant, and Dr. *Torbert* thereby relieved from the necessity of placing himself before the public in no enviable point of light. He drew two wills; in his own words, "not liking the first, he drew the second," naming himself as executor, and *Devoy* as heir.

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I have already referred to part of the testimony of *Julia *Devoy*, her anxiety to send for the bishop, and urging it upon Doctor *Arden*, which is expressly denied by him.

Whether her statement, that Mrs. *H.* said there was a will, and that she and her husband were remembered in it, and requested her to keep still, is true or false, the present question cannot be affected by it. It is possible that Mrs. *H.* may have resorted to such a device to check the intermeddling of *Devoy* and wife; or, which is more probable, that her words were not measured or studied at this time, when her mind, without doubt, was much agitated. She was a woman, and alone; her husband not present to advise with her; a large sum devised to her was in jeopardy; the public administrator was taking charge of the property; no legal adviser was present. In such circumstances she may have spoken unadvisedly and incorrectly. She saw the storm that was gathering, and may have been indiscreet in the means used to avert it. The witnesses who proved the will cannot, on such grounds, be impeached; nor are they responsible for any indiscretions of Mrs. *H.*

It is well established by the proof, that *Jones* was not disposed to make a written will. *Fleury* says, that three days before *Jones* died, he pressed him to make a will, as he was then very ill. *Jones* did not consent, and observed, he did not feel so low as to make a will then. To my mind, it appears evident, that he wished to evade the urgent solicitation of *Fleury*. On Sunday evening, *Fleury* heard *Jones* observe to a Spanish gentleman, in the Spanish language, that he would not see him alive the next morning. *Jones* was of a sound mind. *Fleury*, who had urged the necessity of a will, and who had tendered his assistance, was present. I think it must be presumed, that he died satisfied with what had already been done. There was no restraint upon the testator; there is no proof that any fraud or imposition was practised on him. If there has been a conspiracy, I have not been able to discover it, after the most attentive consideration. The suggestion that, in the prospect of dissolution, this stranger, in a foreign land, would fasten his affections on the country that gave him birth, is both natural and just. The picture so ably drawn by the concluding counsel was not the creature of fancy, but the representation of real life. In the language of an eminent statesman, it may truly be said, "There exists in every good man a virtuous principle of preference for that country where he first drew his breath; where he passed his childhood; where his mind first opened to the endearing relationships of life, which nothing but the hand of death can extinguish; an *amor patriæ*, which remains in spite of rejection and persecutions; and which, even amidst the conflict of the passions, produced by a sense of injury, still secretly leads him to his native country, as his resting-place." I take for granted this principle was not extinguished in the mind of *Jones*; but his returning sympathies for his relatives could not be indulged. He did not know that he had a relation on earth. The ties that once existed had long since been severed; this was his belief. There is no proof that his will excluded a brother, a sister, or a

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parent. In the wide range of selecting the person to inherit his property, we have no control or concern. I am entirely satisfied that the will was fairly obtained; that it was made to reward meritorious services; that it was dictated by partiality and preference for Mrs. *H.*, and, therefore, ought to be established.

I am of opinion, that the decree of the Court of Probates ought to be affirmed.

AUSTIN, CHILDS, FORWARD, HUNTINGTON, ROSECRANTZ, and VIELIE, senators, concurred.

But the rest of the court† concurring with the chancellor, that the decree ought to be reversed, it was “ordered, adjudged and decreed, that the decree of the Court of Probates, appealed from in this cause, be, in all things, reversed; and it is further ordered, adjudged and decreed, that the letters of administration of the goods, chattels and credits, which were of *William Jones*, late of the city of *New-York*, deceased, be granted and issued by the surrogate of the city and county of *New-York*, according to law, as in cases of estates; and that the record be remitted to the Court of Probates.

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23; for affirm-
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Decree of reversal.

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against
JOHN I. DAVENPORT, *defendant in error*.

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IN ERROR to the Supreme Court. The plaintiff brought an action of ejectment in the Supreme Court, to recover part of lot number forty in the township of *Ulysses*, in the county of *Tompkins*. The cause was tried at the *Tompkins* circuit, in *June*, 1821, before Mr. Justice *Van Ness*, when the jury found a special verdict, which contained the facts as stated in the report of the case between the same parties, in the Supreme Court, Vol. 18. p. 295. 303. It also found, that the deed from *Alexander Kidd* to *Isaac Bogart*, and which contained the power of attorney to convey the premises in fee to *J. B.* and on which the plaintiff's title depended, was duly deposited in the office of the clerk of the county of *Albany*, pursuant to the statute on the 27th *April*, 1794: and that the subsequent deed from *A. K.* to *Lemuel Cobb*, from whom the defendant derived title, was also duly deposited in the office of the clerk of *Albany*, pursuant to the statute on the 20th *March*,

K., being entitled to military bounty lands, by deed, dated *January* 12th, 1788, for a valuable consideration, granted, bargained, and sold, to *B.* all the bounty lands to which he was entitled; and in the same deed, he empowered *H.* and *G.*, or either of them, as his attorneys, or attorney, for him, and in his name, to grant, bargain, and convey

the same lands, to *B.*, his heirs and assigns, in case the same should be necessary; upon the grant having passed the great seal of the state, to him, for such bounty lands. Afterwards, on the 8th *July*, 1790, a patent, in the usual form, was issued to *K.* the soldier, who, on the 25th *February*, 1792, for a valuable consideration, by deed, granted, bargained and conveyed the lands to *C.*, his heirs and assigns, forever.

On the 9th *February*, 1802, *H.*, as the attorney of *K.*, in his name, executed a release to *B.* in fee, of the land, in pursuance of the power contained in the first deed from *K.* to *B.* Held, that the first deed from *K.* to *B.* conveyed a life estate only; and *K.* having, before the execution of the power, conveyed the reversion, for a valuable consideration, to *C.*, a bona fide purchaser, without any notice of the prior deed of *K.*, *C.* became seised of the legal estate, or reversion, on the death of *B.*

The doctrine, that a deed executing a power, generally speaking, relates back to the instrument creating the power, so as to take effect from the original deed, is a fiction of law for the advancement of right; and is not to be applied to the injury of a stranger, by defeating his lawful intervening rights.

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1795: both deeds being so deposited before the 1st May, 1795, the time prescribed by the statute. (1 N. R. L. 299. sess. 17. ch. 1.) (a) The Supreme Court gave judgment for the plaintiff, as follows: "Whereupon, all and singular the premises being seen, and by the said court now fully understood; and mature deliberation being thereupon had, for that it seems to the said court upon the whole matter aforesaid, above in form aforesaid found, that the said *John I. Davenport* is guilty of the said trespass in ejectment, in the said declaration above imputed to him, in manner and form as the said *James Jackson* *has above thereof declared against him: Therefore, it is considered, that the said *James Jackson* do recover against the said *John I. Davenport*, his damages aforesaid, by the jurors aforesaid, in form aforesaid assessed; and also one hundred and eleven dollars and eighty-three cents, for his costs and charges aforesaid, to the said *J. J.* by the court now here, with his assent, of increase, adjudged, which said damages in the whole amount to one hundred and eleven dollars and eighty-nine cents; and the said *John I. Davenport*, in mercy," &c. "And upon this, the said *James Jackson* prays the writ of the people, to the sheriff of the county of *Tompkins*, aforesaid, to be directed, to cause him to have possession of his term aforesaid, yet to come, and unexpired, of and in the tenements aforesaid, with the appurtenances. But, because upon the matters aforesaid, by the jurors aforesaid, in form aforesaid found, it seems to the court now here, that the said *James Jackson* was possessed of his said term, of and in the said tenement, during the life of the said *Isaac Bogart* only; and that the estate is determined by the death of the said *Isaac Bogart*: Therefore, it is further considered, that no writ of the said people, to cause the said *James Jackson* to have possession of his term aforesaid, of and in the tenements aforesaid, or any part thereof, be granted to him; but that the same be perpetually stayed," &c. Upon this judgment the writ of error was brought, returnable to this court.

The *chief justice* assigned the reasons for the judgment of the Supreme Court, for which see S. C. 18 Vol. 299—303.

T. I. Oakley, and *J. Duer*, for the plaintiff in error, contended, 1. That the deed from *Kidd* to *Bogart* purports to convey a fee. *Kidd* would be estopped, by this deed, from saying, that he had no such estate, at the time of its execution. (1 *Johns. Cases*, 90. 12 *Johns. Rep.* 203, 204. 13 *Johns. Rep.* 316.)

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2. The subsequent deed, executed by the attorney of *K.* to *B.*, operated, by relation, from the creation of the power *contained in the first deed, so as to vest him with the whole estate, from that time. A deed executed in pursuance of an agreement to convey, relates back to the date of the agreement, so as to give effect to an intermediate conveyance by the grantee. (1 *Johns. Cases*, 81. 2 *Johns. Rep.* 510.) The power contained in the first deed is in the nature of an *agreement*, on the part of *K.*, to convey the fee to *B.*; and when that agreement was carried into effect, by the at-

(a) 1 Rev. Stat. 755.

torney, the deed related back to the time of the first deed, or date of the agreement. When an estate is created under a power, the grantee is in under the power, and takes the estate as if "all that was in the instrument executing the power had been expressed in that creating the power." (*Cruise's Dig.* tit. 32. *Deed.* ch. 16. s. 62, 63, 64, 65. 3 *Johns. Cases*, 548, 549.) The deed, therefore, executed by the attorney of *K.* to *B.* operated, as if the granting words of it had been contained in the first deed of *K.* to *B.*; and, of course, passed the fee.

Again, the deed from *K.* to *B.* passed *all the interest* which the grantor had in the land. The soldier had only an *equitable interest* in the land, at the time of the deed. (10 *Johns. Rep.* 505. *Act*, sess. 13. ch. 59. s. 5.) Such an interest was of the highest kind, or an interest *in fee*, and could be entirely granted, without any words of inheritance. A *cestui que trust* will take a fee, without the word *heirs*, when a less estate will not satisfy the intent of the parties.

The *equity* of the case is clearly with the plaintiff, who purchased the whole estate of *K.* in the land, for a valuable consideration. He took a deed for all the estate of the soldier, which he deposited in the clerk's office, in conformity with the statute. The defendant claims, under a subsequent deed, from the same soldier. The attempt on his part is to set up the act of *K.* to defeat an estate granted by himself.

The act of April 6, 1790, provides, that all grants, and "other dispositions" of the land, by the soldier, before the issuing of the patent, shall be valid. The intent of this act was not "to divest, but to confirm and enlarge the interest before granted." (10 *Johns. Rep.* 504.) But if the defendant's doctrine is to prevail, the statute, instead of confirming and enlarging the estate granted by *K.* to *B.*, will *have the effect of enabling *K.* to destroy that estate, by turning an equitable estate in fee, into a legal estate for life; and to revoke a power, by a new grant of the land, after the patent, which he could not have done before it issued. Such a doctrine is, manifestly, against equity, and the acknowledged intent and policy of the statute. It rests on the principle of law, that a power to a stranger, having himself no interest whatever in the land, is a naked power, always revocable by the donor, until it is executed. (1 *Sid.* 15. *Hard.* 415. 1 *Caines's Cases in Error*, 15.) Such a power is said to be *simply collateral*. (*Sugd. on Powers*, 2d *Ed.* 43.) Where a power is given to a person having an interest in the land, to create some estate in it, for the benefit of a *third person*, it is said to be a power coupled with an interest, or a power relating to land. (*Powell on Powers*, 10, 11. *Sugd.* 46.) And such a power is either *appendant*, when the power is annexed to the estate of the donor, and to be executed out of that estate, or *in gross*, where it takes effect in the appointee, out of the estate remaining in the appointor; as in case of a tenant for life, with power to create an estate, to take effect after the expiration of his own. A power to a stranger, to charge an estate for his own benefit, is not *simply collateral*, though he has *no interest in the land*; and this shows that the general rule, as given,

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is not true. The true question is, who has an *interest in the power*; not who has an interest in the land.

Then, what are the characteristics of a *naked* or *simply collateral* power? (1.) The estate, on which the power is to operate, remains in the donor or grantor of the power, until it is executed, except as to powers of revocation. (2.) Such power is to be executed for the benefit of the grantor, or to answer some object or purpose in which he *claims an interest*, or to affect an estate *over which he has a control*, notwithstanding the creation of the power. (*Bergen v. Bennet*, 1 *Caines's Cases in Error*, 13. *arguendo*.) (3.) Such a power is created without any valuable consideration, moving to the donor from the appointee under the power, and is always to be construed strictly. (*Courp.* 263.) In these cases, the donor retains the estate, subject to his disposal, until the power takes effect; the appointee having paid no valuable consideration *for the estate to be created by the power, the power itself is entirely voluntary on the part of the donor, and the appointee cannot compel an execution of the power. In all these cases, therefore, the donor has, of course, the power under his control.

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Now, to compare the power in the present case, with the one just described. The power must be considered as it was at the time of its creation by the deed from *K.* to *B.* If it was *then irrevocable* by *K.*, as between him and *B.*, the statute and the patent, subsequently issued, cannot alter its nature, to the prejudice of *B.* No estate remained in *K.* after the creation of that power, which was to be executed solely for the benefit of *B.*, the appointee. The power is contained in the very instrument granting the estate, and is part of the estate purchased by *B.*, and for which he paid a valuable consideration to *K.*, who, after the patent issued to him, was a naked trustee for *B.*, and might have been compelled to convey the fee to him. The power, therefore, was not voluntary. Both *K.*, and his attorney, might have been compelled to execute it. It is the case of a mere trustee creating a power, to turn the equitable estate of his *cestui que trust* into a legal estate. The power could not have been created in any other manner. A power cannot be given to a man to enlarge his own estate. *B.* could not have executed this power, if it had been given to himself. Then the question is, Could *K.*, in any way, revoke such a power as this? It is, certainly, against equity, and every principle of justice. Powers operating under the statute of uses, are to be construed as liberally at law as in equity. (*Woolston v. Woolston*, 1 *Bl. Rep.* 281.) They should be construed liberally, so as to effectuate the *intent* of the parties. Suppose, the case of a purchase of an estate, and a valuable consideration paid, and a power given by the vendor to a stranger, to convey the estate to the purchaser, could the donor revoke the power? Powers operate under the statute of uses, by the substitution of a new use in the place of a former one, which new use is executed by the statute, and the former uses cease. (*Cruise's Dig.* tit. 32. *Deed*, ch. 15. s. 65. 61.) If the power, in this case, is executed, no new use springs out *of the estate of *K.*; as *B.*

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was seised of the entire use, by the first conveyance, being clearly the *cestui que trust* in fee. This shows that the power is inseparably connected with the interest of *B.*, in the land. It was a part of the purchase made. It was to be executed entirely for his benefit. It could operate only on the estate already possessed by him. No other person could have any interest in the execution or revocation of the power. Again, that *B.* had an interest in the power, connected with his interest in the land, may be tested, by the inquiry, whether the power could not have been released by him. For it is a settled principle, that a simply collateral, or mere naked power, cannot be released or extinguished by any act of the donee. (*Powell on Powers*, 8, 9. *Cruise's Dig.* tit. 32. *Deed*, ch. 20. s. 10. *Co. Litt.* 265. b. *Harg. and Butler's Notes*, 298.) If a feoffee to uses (before the statute of uses) was empowered by will, by the *cestui que use*, to sell the land, this was a simply collateral or naked power. If the feoffee made a feoffment once, he still might sell the land under the power, as his feoffment did not extinguish the power. This shows that a feoffee to uses had no such interest in the land, as to enable him to control a power given to himself. A trustee, now, is what a feoffee to uses was, before the statute. It would follow, then, that a trustee can do no act to defeat a power, in the execution of which his *cestui que trust* has an interest.

Did the deed, then, from *K.* to *Cobb*, destroy this power? *K.*, at most, was a mere trustee. He had no interest in the land with which a power could be coupled, or to which it could relate. A power must relate, either to the interest of the donor or of the appointee. In this case, it cannot relate to the interest of *K.*, the donor, and must, therefore, be connected with the interest of *B.*, the appointee. The deed from *K.* to *Cobb*, being a bargain and sale, if it operates at all, must operate under the statute of uses. But had *K.* any use in the estate, which could pass by such a deed?

Collier, contra. 1. The deed from *K.* to *J. B.* being without words of inheritance, conveyed only an estate for life, which was determined by the death of *J. B.*, pending the suit, and before judgment in the court below. To *create an estate in fee, the word *heirs* is absolutely necessary. (1 *Co.* 100.) A bargain and sale of land to *A.* "to hold the same in trust, for *B.* and *C.*, their respective heirs and assigns, forever, in fee simple," creates a life estate only in *A.*, and at his death, the estate reverts to the grantor; and *B.* and *C.* can only resort to a court of equity to enforce the trust. (*Jackson v. Myers*, 3 *Johns. Rep.* 388.) But it is said, that this is a peculiar case; that *K.* was not seised at the time he sold to *B.*, but had only an equitable title or claim on the government for the land. To this we answer, that by the statute, (sess. 13. ch. 59.) the patents for these military lands are to issue to the soldiers, their heirs and assigns, and the lands are to be deemed and adjudged "to have vested in the respective grantees, their heirs and assigns, on the 27th March, A. D. 1783; and all grants, bargains, sales, devises, and other dispositions,

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made by any of the said grantors, or their heirs or assigns, of the said lands," &c. between the said 27th *March*, 1783, and the date of the patent, shall be as good and effectual, as if the said letters patent had been granted on the said 27th *March*." A court of law, then, at least, is bound to give the same construction and effect to the deeds of these soldiers, as if the patent had, in fact, been issued prior to their deeds. "Courts of law," says *Kent*, Ch. J., "when any such conveyances are brought before them, are to give them the same operation, as if they had been executed by the party seised, and such have been the decisions of the Supreme Court." (10 *Johns. Rep.* 504.)

2. The lessor of the plaintiff derived no title under the release of the 9th *February*, 1812, from *Henry J. B.* to *J. B.*, by virtue of the power contained in the deed from *K.* to *J. B.*: (1.) Because, being a mere naked power, not coupled with any interest, it was revocable, and was, in fact, revoked by the subsequent deed from *K.* to *Cobb*. (*Osgood v. Franklin*, 2 *Johns. Ch. Rep.* 1. 19. 14 *Johns. Rep.* 527. *Jackson v. Given*, 16 *Johns. Rep.* 167. *Co. Litt.* 112. b. 113. a. 181. b. 1 *Caines's Cases in Error*, 1.) If a man makes a letter of attorney, to make livery, he may revoke it, before it is executed; but if it has been lawfully executed, it cannot be revoked. A mere naked power is *revocable, at the pleasure of the grantor, during his life, and is revoked by his death; and it may be revoked by a deed, or by any act of equal solemnity, inconsistent with the power delegated. (*Powell on Powers*, 112. 116. 253, 254. *Shepherd's Touchst.* 525. 10 *Co.* 143. b. *Comyn's Dig. Uses*, L. 4.) If an infant convey during his minority, a conveyance to another person, after the grantor arrives at full age, is of itself a revocation of the former grant. (*Jackson v. Carpenter*, 11 *Johns. Rep.* 530. *Jackson v. Burchin*, 14 *Johns. Rep.* 124.)

The only question seems to be, What is a power coupled with an interest, within the meaning of the rule? "Powers relating to the land, are those which are given to some person having an estate or interest in the land over which they are to be exercised." (4 *Cruise's Dig.* 229. tit. 32. ch. 20. s. 49.) "Those powers which are reserved to the owner of the land, or to a person deriving under the instrument creating the power either a present or future estate or interest in the land, are said to be *relating to the land*." (*Harg. & Butler's Notes. Co. Litt.* 342. n. 1.) A power simply collateral, or a naked power, is where authority is given to a mere stranger, disposing of an interest, in which he had not before, nor has, by the instrument creating the power, any estate whatever. (*Powell on Powers*, 8, 9. 1 *Caines's Cases in Error*, 15, 16, 17. 1 *Inst.* 52. b.) "The grantee of such a power having no interest connected with the power, has, of course, no interest in the revocation." (Per *KENT*, J. 1 *Caines's Cases in Error*, 17.) A power coupled with an interest, then, within the meaning of the rule, is where the power and the interest are united in the same person. "It is the possession of the legal estate, or right in the subject matter over which the power is to

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be exercised, that makes the interest in question." (Per KENT, *J. 1 Caines's Cases in Error*, 16.)

In most of the cases of powers given to executors to sell, either creditors or legatees have an interest; and, most frequently, there is an interest under the will, or the instrument creating the power. (16 *Johns. Rep.* 167. 14 *Johns. Rep.* 554. 3 *Binney's Rep.* 69. *Dyer*, 177. a. pl. 22.) It is true, that in a court of equity an equitable interest is *deemed sufficient. If executors are charged with a *trust* relative to the estate, depending on the power to sell, the power in chancery will be held to survive, because it is a rule of that court, that a trust will not be permitted to fail for want of a trustee. (2 *Johns. Ch. Rep.* 20, 21.) But if a power be given to executors, who have no legal or equitable interest in the subject, it will be held, even in a court of equity, as a mere naked power; and if one of the co-executors dies, the power does not survive. (14 *Johns. Rep.* 527. *Bull v. Bull*, 3 *Day's Rep.* 384.) That the power, in this case, was contained in the same instrument, can make no difference. (18 *Johns. Rep.* 301.) "If a power is in another deed, executed at the same time, it is tantamount, as if it was in the same deed by which the uses are limited." (1 *Ventr.* 279. *Comyn's Dig.* tit. *Uses*, L. 2.)

(2.) Because the reversionary interest remaining in *K.* passed, by the deed, to *Cobb*, who was a *bona fide* purchaser, without notice, and could not be affected by the subsequent release from *H. J. B.* to *J. B.* If *K.* is to be deemed seised of the fee, as of the 27th of *March*, 1783, by operation of the statute, and the deed from *K.* to *B.* for want of words of inheritance, conveyed only a life estate, it follows, of course, that the reversion remained in *K.* But it is contended that the power, and the deed given under the power, are to be regarded as one instrument, and relate to the time of the creation of the power. It is true, the party takes under the authority of the power; but not from the time of the creation of the power. (*The Duke of Marlborough v. Lord Godolphin*, 2 *Vesey*, 78. *Cruise's Dig.* tit. 32. ch. 16. s. 63. 3 *Johns. Ch. Rep.* 550.) It is not a relation to make things vest from the time of the power, but from the time of the act executing the power. The cases to show, that a deed executed under an agreement to sell, relate back to the time of the first contract, are all cases where the rights of third persons are not affected; or where the doctrine is applied to give effect to some intermediate disposition of the land, as where the vendee, after the contract, has undertaken to convey. (1 *Johns. Cases*, 81. 90. 2 *Johns. Rep.* 510.) A deed will not take effect, by relation, *except between the same parties, and for the advancement of justice. (4 *Johns. Rep.* 230. 3 *Caines's Rep.* 263. 12 *Johns. Rep.* 140. 1 *Johns. Ch. Rep.* 297, 298.)

(3.) Because the conveyance from *J. B.* to *T. Fowler*, being a mere quit-claim, and without covenants of warranty, the subsequent release from *H. J. B.* to *J. B.*, did not enure for the benefit of the lessor of the plaintiff; but if it had any operation upon the reversionary interest, it vested it in *J. B.*, and thus showed a subsisting title out of the lessor of the plaintiff.

Where a person, having an interest in land, conveys it by

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deed *with warranty*, and, afterwards, purchases the same land, it shall enure, as between them, in pleading, by way of *estoppel*, for the benefit of the grantee; (1 *Johns. Cases*, 90, 91. 13 *Johns. Rep.* 316: *Co. Litt.* 265. a.) but no title not then *in esse* will pass, unless there is a warranty in the deed; and then it operates by way of *estoppel*, to avoid circuitry of action. (14 *Johns. Rep.* 193, 194.) All the authorities put it on the ground of an *estoppel*; but a stranger cannot take advantage of, nor is he bound by the *estoppel*. (*Co. Litt.* 352. a. 3 *Johns. Cases*, 103. *Cro. Car.* 109, 110.) *Estoppels* are not favored in law.

3. It is admitted, that in a court of equity, the deed from *K.* to *B.* would, if there were no intervening rights of third persons to be affected, be sufficient to create a trust in fee, without the word *heirs*. But as, by the act of April 6, 1790, the patentee or soldier is deemed to be seised of the land on the 27th of March, 1783, we contend, that a court of law, in cases arising under the act, must be governed by the ordinary rules of conveyance, and is bound to give the same operation to the deed, as if executed by the party seised. (*Fisher v. Fields*, 10 *Johns. Rep.* 495. 504.) And even in a court of equity, *Cobb*, being a *bona fide* purchaser without notice, would hold the reversion discharged of the trust. (2 *Fonbl. Equ. Cas.* 146, 147. 4 *Johns. Ch. Rep.* 136. 1 *Johns. Ch. Rep.* 566. 575. 2 *Vernon*, 271. *Sugden's L. of V.* 476. *Comyn's Dig. tit. Chancery.* 4 *W. 2.* 4 *W.* 29.) A mere equitable title cannot be set up at law against the legal estate. (2 *Johns. Rep.* 221. 84. 3 *Johns. Rep.* 424. 8 *Johns. Rep.* 487. 16 *Johns. Rep.* 305.)

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*THE CHANCELLOR. The facts of this case lie in a narrow compass.

Alexander Kidd, a soldier, was entitled to lot No. 40 in *Ulysses*, and a patent for the lot issued to him on the 8th of July, 1790. By the act of the legislature of the 6th of April, 1790, (sess. 13. ch. 59. s. 5.) the land was to be deemed vested in every such grantee from the 27th of March, 1783, and all his intermediate sales and dispositions thereof, were to be deemed equally good and effectual, as if the letters patent had actually issued on that day. *Kidd*, by deed of 12th of January, 1788, sold all his interest, as a soldier, in the military bounty lands, to *Isaac Bogart*, for the consideration of nine pounds. The deed contained no words of inheritance, and it, therefore, conveyed only a life estate in the lands to *Bogart*; but it empowered two other persons named in the deed, or either of them, to convey the land in fee to *Bogart*, in case the same should afterwards be deemed necessary.

It is very probable, that *Kidd* intended, by that deed, to sell to *Bogart* all his interest in the military bounty lands; and the power contained in the deed to execute a subsequent conveyance in fee, was to provide for the consummation of the title as soon as the patent should issue. The patent did, afterwards, issue to *Kidd*, and he became seised in fee of the lot in question, except so far as he had, in the intermediate time, parted with his legal title to *Bogart*. He had only parted with a life estate, but with authority to his

attorney to release the fee, which that attorney omitted to do, until long after *Kidd* had sold to *Cobb* his reversionary interest in the lot. The deed from *Kidd* to *Cobb*, was made on the 25th of *February*, 1792, and it conveyed, for the consideration of ten pounds, all his interest in the military bounty lands; and to this deed was annexed his discharge as a soldier from the *American* army in 1783.

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The deed to *Bogart* of the life estate, with a power to convey the fee, was deposited in the clerk's office in *Albany*, in *April*, 1794, and the subsequent deed to *Cobb*, conveying the reversion in fee, was deposited in the same office in *March*, 1795. Both deeds were deposited in season; and both stood upon an equal footing, so far as the deposit was concerned, for the law made no distinction as to the **time* of the deposits, if made before the first of *May*, 1795. The deed to *Cobb* was duly recorded in *Cayuga* county in *June*, 1813, and the deed to *Bogart* not before *May*, 1818.

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Here, then, we have two distinct deductions of titles; the deed to *Bogart*, under which *Henderson*, the lessor of the plaintiff, claims, and the deed to *Cobb*, under which *Davenport*, the defendant, claims; and the question is, whether the reversionary interest in the land, which resided in *Kidd*, subject to the life estate in *Bogart*, was legally conveyed to *Cobb*, so as to enable him to hold, in opposition to the subsequent execution of the power contained in the deed to *Bogart*.

When *Cobb* purchased of the soldier, in 1792, he purchased *bona fide*, for a valuable consideration, without any notice of the prior deed to *Bogart*; and if *Kidd*, the soldier, had any legal estate remaining in himself, which could be conveyed by him, it must have passed to *Cobb*. I cannot perceive any room for doubt upon this point. *Bogart* had only a life estate, owing to the imperfection of his deed, and that deed, imperfect as it was, would have been sufficient in equity, as against *Kidd*, or as against any person purchasing from him with notice of it. But *Cobb* had not any notice of that deed; and if *Kidd* had a legal capacity to convey his reversion, it must have legally vested in *Cobb*; and it appears to me, it could not have been legally divested by any of the subsequent events.

Admitting that *Kidd's* power of attorney, to release his interest to *Bogart*, could not lawfully be revoked, yet the release was not, in fact, executed, and the reversion in fee did, in judgment of law, reside in *Kidd*, when he conveyed it to *Cobb*, in 1792. It was a breach of trust, or of good faith in *Kidd*; but *Cobb* ought not to be affected by it, for he was a stranger to the deed to *Bogart*, and to its contents. The power of attorney was not a legal lien or encumbrance upon the land, affecting a stranger who dealt with *Kidd*, without notice of it. The most that can be said is, that *Kidd* held the reversion, subject to the power, or as trustee for *Bogart*. But *Cobb* did not know that *Kidd* had incapacitated himself, in a moral and equitable view, from conveying the reversion to him, or that he had already authorized an attorney to convey it to *Bogart*. Though a trustee **conveys* away the trust subject, in breach of his trust, yet if he had the legal title, and the person who

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took it from him, for a valuable consideration, had no notice of the trust, he will hold the land discharged of the trust. It appears to me impossible to maintain, that *Kidd* had no legal capacity to convey his reversionary interest. Whoever has the legal title can convey it, if he be under no legal disability. If he holds the land in trust, or if he be under a contract to convey, or has given a power of attorney to a third person to convey, all these may be obligations resting upon his conscience, and disabling him in equity to convey; but still, if he does convey, and to a person who has no knowledge, and is not chargeable with any knowledge of these equitable impediments, and who pays a valuable consideration the purchaser will hold, and the party injured must look to him who has broken his trust, or violated his duty.

The events subsequent to the conveyance to *Cobb*, are these *Bogart* sold to *Fowler*, in 1791, and *Fowler* to *Henderson*, the plaintiff in error, in 1792; neither of those deeds was recorded until 1818; and in that year, *Bogart* died, and his life estate terminated. There was no release under the power of attorney contained in the deed to *Bogart*, until 1802, which was ten years after *Kidd* had anticipated the execution of that power by conveying the same reversionary interest to *Cobb*. This release or execution of the power, in 1802, was never recorded, and when *Cobb* sold and conveyed to the defendant, *Davenport*, in 1815, for 1000 dollars, (and which deed was immediately recorded,) the defendant had no knowledge of the release to *Bogart*. If he knew of the power, he had no reason to presume that it could ever be executed, considering that 27 years had elapsed between the time of the original purchase by *Bogart*, and the purchase by the defendant from *Cobb*, and that 25 years had elapsed since the issuing of the patent, when, according to the language of the deed to *Bogart*, the power was intended to be executed. *Davenport*, the purchaser from *Cobb*, had good reason to presume, that if any execution of the power existed, it would have appeared upon record, for the statute required all deeds, affecting in law or equity the military lands, to be recorded. But *whether the defendant had notice or not, is immaterial, provided the deed to *Cobb* was valid, and conveyed a title unaffected by the power. Whatever title *Cobb* had, the defendant would take, with or without notice.

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The case, then, appears to resolve itself into this single point: Did the execution of the power contained in *Kidd's* deed to *Bogart*, by a release of the fee to *Bogart*, in 1802, overreach and destroy the intermediate release to *Cobb*, in 1792? I am of opinion that it did not; and I do not put the cause upon the point, whether the power of attorney, contained in the original deed to *Bogart*, was, or was not, a power legally subject to revocation; and whether *Kidd* could, or could not, revoke it, as between him and *Bogart*. I put my opinion upon this ground: That the reversionary estate in fee in the premises, after the original deed from *Kidd* to *Bogart*, continued to reside in *Kidd*, and that *Kidd* passed that interest to *Cobb*, prior to the execution of the power, and that *Cobb* was competent to take and to hold, inasmuch as he

was a *cona fide* purchaser, without notice of the power, and was not to be affected by a subsequent execution of it. This ground appears to me to be just and solid, and founded equally on the rules of law and the principles of policy.

It cannot properly be said that *Kidd* did not continue seised of the reversion in fee, after his deed, in 1788, to *Bogart*. He had the entire fee in himself, and as he conveyed only a life estate to *B.*, the residue must remain in him, and could only pass out of him by deed or by descent. The power of attorney was no conveyance; it was an authority to a stranger to convey the reversion to *Bogart*; and until the execution of the power, the reversion continued as if no such power had been created.

It was suggested upon the argument, that a power of this kind could not be barred or extinguished by a conveyance; and that when it was once executed, it would relate back to the time of the instrument creating the power. Thus, the deed to *Bogart*, in 1783, contained a power of attorney to third persons, therein named, to convey the whole estate in fee to *Bogart*; and the argument is, that when the power was executed, no matter when, whether in ten, twenty, or fifty years afterwards, it would relate back to the time of the *deed to *Bogart*, as that was the origin of the power, and would avoid all intermediate conveyances, contrary to it. I am not going to deny the general doctrine, that an estate created by the execution of a power, takes effect as if created by the original deed. (*Litt. s. 169. Co. Litt. 113. a. and Cook v. Duckenfield, 2 Atk. 562—567.*) But this is only to certain purposes, and as between the parties, and not as to the intervening rights of strangers to the power. A deed executing a power, is, in many respects, considered as a substantial independent instrument. Lord *Hardwicke* is said (*2 Vesey, 65.*) to have decided, that such a deed was a conveyance within the statute of *Elizabeth*, and liable to be affected by the provisions of the statute against fraudulent conveyances. It is a deed affecting land, within the registry acts; and in countries where deeds are required to be recorded, it must be recorded as well as any other deed, otherwise, purchasers would be unable to discover whether the power had been executed, and would be liable to be defrauded. This was so decided in *Scrafton v. Quincey, (2 Vesey, 413.)* by Sir *John Strange*, the master of the rolls. That case appears to me to be quite decisive of this cause, for the deed under the power was never recorded; and, therefore, the deed to *Cobb*, and the deed from *Cobb* to *Davenport*, the defendant, being duly recorded, are certainly entitled to preference. When the defendant purchased of *Cobb*, in 1815, it was impossible for him to guard himself against the secret execution of this power, for the evidence of the execution of the power was not upon record.

This doctrine, that a deed executing a power refers back to the instrument creating the power, so that the party is deemed to take under the deed from the grantor by whom the power was created, and not from the power, is a fiction of law, and so it was considered in *Bartlett v. Ramsden; (1 Keb. 570.) relatio est fictio juris*, according to the resolution in *Menvil's case; (13 Co.)* and

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is upheld to advance a right, not to advance a wrong, or to defeat collateral acts which are lawful, and especially if they concern strangers. This limitation of the fiction, so as to prevent it from doing injury to strangers, or defeating mesne lawful acts, is the common language of the books; (4 *Johns. Rep.* 234. 12 *Johns. *Rep.* 144. 18 *Viner*, 287. B. pl. 2. *Butler and Baker's case*, 3 *Co.* 25. 29. a. 2 *Vent.* 200.) and it received a very particular illustration by Lord *Hardwicke*, in the case of *Marlborough v. Godolphin*, (2 *Vesey*, 78.) He admitted the principle, that where a person takes by execution of a power, he takes under the *authority of the power*; but there was no case, he said, to maintain that he must take, by relation, *from the time of the creation of the power*. The meaning of the rule was, that persons taking under a power, must take in the same manner, as if the power, and the instrument creating the power, had been incorporated in one instrument, but not in the same time. The title is derived from the act creating the power, but the time of vesting of the right is the time of the act of execution of the power. These executions of power, says Lord *H.*, do not refer back, like assignments in commissions of bankruptcy; for the latter refer back by force of the statutes of bankruptcy, to avoid mesne wrongful acts. The same distinction was alluded to by Lord *Hardwicke*, in *Southby v. Stonehouse*; (2 *Vesey*, 610.) and I am greatly mistaken, if this be not the plain common sense and manifest justice of the thing. Any other construction would lead to fraud and intolerable abuse.

It is stated in the books as a general rule, that a simply collateral or naked power cannot be barred or extinguished by disseisin, or by fine, feoffment, or other conveyance. (*Albanie's case*, 1 *Co.* 110. *Digg's case*, 1 *Co.* 173. *Edwards v. Slater*, *Hard.* 410. *Willis v. Sherral*, 1 *Atk.* 479. 15 *Hen. VII.* fo. 11. b. cited and translated in Appendix No. 1. to *Sugden's Treatise of Powers*.) It is said, for instance, that if a power to sell land be given to executors, and the heir of the testator enters and enfeoffs *B.*, who dies seised, yet the executors may sell, and the vendee will be in by the will, which is paramount to the descent, and that a descent which tolls an entry does not toll a power. (*Jenk. Cent.* 184. pl. 75. *Bro. Abr.* tit. *Devise*, pl. 36. *Parsons*, Ch. J., in 5 *Mass. Rep.* 242.) I presume, that I may venture, upon the strength of the authorities which have been previously mentioned, and upon the reason of the thing, to question the universality of the application of this rule, and to insist that it ought to be confined within reasonable limits. *If I have not misapprehended the cases on this subject, such a power cannot lay dormant and concealed, and then spring up, at any distance of time, and prevail against a conveyance from the person having the legal title, to a purchaser for valuable consideration, without notice of the power; and especially, if the lands lie (as they do in this case) in a recording county, and the purchaser's deed be recorded before the deed under the power, and without knowledge of that deed. So far, and no further, it is necessary to go in this case; and I wish to be understood as confining my opinion to the circumstances of this case. I conclude, then,

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(1). That *Henderson*, the plaintiff, must make out his title to the fee under the execution of the power of attorney contained in the deed from *Kidd* to *Bogart* in 1788.

(2). That the release under that power operates as against the defendant, only from the time of its execution, in 1802, and is not to be carried back, by relation, to the date of the deed creating the power, so as to destroy the operation of the deed to *Cobb*, in 1792, and, consequently, the deed from him to the defendant, in 1815. This would be to defeat an intervening vested right and title to the fee acquired by a third person, from the party having the legal title, without notice of the execution, or even of the existence of the power. The deed to *Bogart*, containing the power, was not recorded until after the record of the purchase by the present defendant, and the subsequent deed, in execution of the power, was never recorded. If a title so acquired under a power not recorded, was to prevail against a regular title fairly acquired, and duly recorded, without notice, it would be in vain to rely upon the provisions of the recording statutes. A party need only create a power, and let it sleep for an age, unknown and undetected, and then awaken its potent energies, and sweep away the titles, and the hopes, and the fruits of a whole generation. I cannot bring my mind to accede to any such mischievous doctrine; and I am, for the reasons assigned, of opinion, that the judgment of the Supreme Court ought to be affirmed.

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This being the unanimous opinion of the court, it was, thereupon, ORDERED, ADJUDGED and DECREED, that the judgment of the Supreme Court, in this cause, be affirmed; and that the plaintiff in error pay to the defendant in error, his costs, to be taxed in defending the writ of error in this court; and that the record be remitted, &c.

Nov. 11th.

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Judgment of affirmance.

LOT HADDEN, impleaded with JOHN DAVIS, *appellant*,
against

WILLIAM SPADER, BENJAMIN HAIGHT, HALSTED E.
HAIGHT, UNDERHILL HALSTEAD, EZEKIEL HALSTEAD,
JOHN GREACEN, HENRY TROWBRIDGE, JONATHAN JEWETT, and JAMES N. CODWISE, *respondents*.

APPEAL from the Court of Chancery. The respondents, on the 25th of *January*, 1820, filed their bill, stating, that *John Davis*, of the city of *New-York*, merchant, being largely indebted to them, and others, stopped payment on the 26th of *June*, 1819, and refused to pay any of his creditors. That, being possessed of a large stock in trade, and having debts due to him to a large amount, he, for the purpose of defrauding his creditors, combined with the appellant, *Hadden*, to conceal the property, so as to retain it for his own use, and delivered the same to the appellant,

The Court of Chancery has power to assist a judgment and execution creditor, to discover and reach the property of his debtor, in whose soever hands it has been placed, out of the reach of an ex

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then place Lord *E.* with Lord *Northington*, and Lord *Hardwicke*, in the scale against the doubts of Lord *Thurlow*, Lord *Eldon* and Lord *Manners*. But it is enough for the respondents, that the law, as it stood in 1775, is in their favor. The consequences of the doctrine contended for by the other side, are obvious. A debtor may possess millions of property; in stock, bonds or money; may riot in luxury, and set his creditors at defiance.

PLATT, J. Is there not a sufficient remedy under the ninth section of the insolvent act? or, if the person of the debtor cannot be reached, under the absent and absconding debtor act?

Griffin. The remedy afforded by that section of the statute, though it appears powerful on paper, has been found wholly ineffectual in practice.

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Again, the appellant paid over the money to *Davis* four *months after the respondents filed their bill, which was a sufficient notice. (*Jackson v. Dickenson*, 15 *Johns. Rep.* 309.)

T. A. Emmet, in reply, said, it was certainly a principle of strict morality, that a man should pay his honest debts; but this was, in some degree, a duty of imperfect obligation. The positions, however, of the counsel for the respondents, that the law would compel the unwilling debtor; and if the remedy at law was defective, a court of equity would afford an adequate remedy for that purpose, were neither of them wholly true, nor wholly false. The law does afford a remedy to a certain extent; and, if defective, it is for the legislature, not a court of chancery, to supply the defect. In *England*, the legislature have interposed, and passed bankrupt laws, which reach merchants and traders. Our legislature has gone further, and extended its aid against debtors of every description, who, after being arrested on a *ca. sa.*, do not, within sixty days, pay the demands against them; and subjects all their property, real and personal, including choses in action, to the payment of their debts. There appears, therefore, to be no urgent necessity for courts to stretch the law, to meet a supposed evil in a particular case.

Did Lord *Thurlow*, in 1790, say, that he was making a new law, or that he declared the old law? We contend, that the cases cited for the respondents never were the law of *England*, or of this state. The money received by the appellant, in this case, was, in no sense, a trust. *Hadden* held as a debtor of *Davis*. The assignment to him became absolutely void, in consequence of the creditors not complying with conditions on which it was made.

There are two classes of cases in which courts of equity have interfered in aid of a creditor: 1. In order to compel a discovery of assets, tangible by execution at law; 2. To remove an impediment created by equity; and all that is allowed in this class of cases, was to let in the judgment creditor to redeem the equitable encumbrance, and thereby remove the impediment. The case of *Brinckerhoff v. Brown* belongs to the first class; that of *M'Dermutt v. Strong* to *the second. In *Bayard v Hoffman*, (4 *Johns* 394

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Ch. Rep. 450.) the chancellor has very ably discussed the principle, though he did not make it the ground of his decision, in that case. The cases of *Taylor v. Jones*, *Horne v. Horne*, *King v. Dupine*, and *Patridge v. Gopp*, which have been relied upon by the other side, have been shaken, if not overruled, by numerous subsequent decisions; and are considered by all the elementary writers as overruled. (*Rob. on Fraud. Conv.* 421, 422. *Atherl. on Fam. Settl.* 221, 222.) The opinions of Lord Eldon, in *Dundas v. Dutens*, (1 *Vesey*, jr. 196.) *Nantes v. Corrock*, (9 *Ves.* 189.) *Rider v. Kidder*, (10 *Vesey*, 368.) are not mere *dicta*, but decisions on this point. (2 *Cox*, 239, 240. *Simmons v. Kinnard*, 4 *Vesey*, 735—745.) In *Caillaud v. Estwick* (2 *Anst.* 381.) the counsel, *arguendo*, cite the case of *Dundas v. Dutens*, as decided by Lord Thurlow; and Chief Baron M'Donald said, he remembered applying, in behalf of the crown, to have the assistance of equity, in aid of an extent, to get at stock in the funds, and it was refused. In *M'Cartry v. Goold*, (1 *Ball & Beatty's Rep.* 387.) Lord Manners expressly decides this point, that *choses in action*, or stock, could not be reached by the Court of Chancery. And in *Brinckerhoff v. Brown*, the chancellor recognizes this doctrine. He says, "if a creditor seeks aid as to real estate, he must show a judgment creating a *lien* upon such estate; if he seeks aid in respect to personal estate, he must show an execution giving him a *legal preference or lien* upon the chattels."

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WOODWORTH, J. It would be matter of surprise as well as regret, if, in a system of jurisprudence, that has been matured by the wisdom of ages, adequate remedies were not provided for the violation of every important civil right. Although this consideration will have no influence in deciding on a case, where the power of the court to redress an alleged wrong is drawn in question, it may, nevertheless, be useful in calling for the most careful and strict examination, before the point is conceded, that there is no efficient remedy. The rules and maxims of a court of chancery are as fixed as those which govern inferior jurisdictions. To break in upon these rules, because the court may deem *it expedient and salutary, would justly excite alarm, and be the source of incalculable evils. Every man of intelligence knows too well the value of stability and uniformity in judicial decisions, to countenance, for a moment, any indirect attempt, under the semblance of resisting a particular mischief, to invade or encroach on the legislative power. To determine, in every case, the precise boundary, may be a difficult and delicate task. Such a conflict, however, cannot be of frequent occurrence, because the general powers of courts are defined with sufficient accuracy, to guard against an excess of jurisdiction. On the argument, the power and authority of the Court of Chancery to grant the relief, which has given rise to this appeal, was strongly contested. It is not pretended, that a court of common law possesses adequate powers. The subject in controversy has been withdrawn beyond the reach of its process.

A court of equity is the only tribunal, whose proceedings can reach the property of a debtor in the hands of his trustee; for I

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shall subsequently endeavor to show, that the remedy, under the act giving relief in cases of insolvency, is ineffectual and illusory, and may be evaded by every fraudulent debtor.

It is laid down as an undeniable proposition, that the jurisdiction of a court of equity will be exercised, when the principles of law, by which the ordinary courts are guided, give a right; but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose. (*Mitf. Pl.* 103.) Hence a system of jurisprudence has grown up, adapted to afford a remedy for injuries not cognizable in other courts. These principles are fixed and certain; but, as Lord *Rcdesdale* observes in *Bond v. Hopkins*, (1 *Sch. & Lef* 420.) "They decide new cases as they arise, by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles." And, again; "Nothing is better settled in courts of equity, than that, where a title exists at law, and in conscience, and the effectual assertion of it at law is unconscientiously obstructed, relief should be given in equity; and *that, when a title exists in conscience, though there be none at law, relief should also, though in a different mode, be given in equity."

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In cases of trust and fraud, Mr. *Maddock* observes, (1 *Madd Ch.* 8.) courts of equity seem unwilling to set bounds to their jurisdiction, and say how far they will go; evidently, because fraud and trusts are peculiarly of chancery jurisdiction, and consequently its powers ought to be so exercised, that no subtilty or cunning shall be able to prevent the detection of fraud, or cause the failure of justice; that a trustee, while acting fairly and honestly, shall be sure of the protection of the court, but never be permitted to become the instrument of wrong.

The case now before the court raises this question; whether a debtor, who has placed his funds in the hands of a trustee, where they cannot be reached by an execution at law, can put his creditor at defiance, and enjoy the benefit of those funds, which ought to be appropriated to the payment of his debts. The injustice and immorality of such a course will not be doubted; but it is urged, that the powers of the court cannot rightfully be carried so far as to correct the mischief; and if they could, the application of the rule would be attended with great and serious inconvenience. If, in truth, no case could be found, where relief had been applied for, or granted on facts similar to those before us, that result would, by no means, establish the doctrine contended for; the inquiry would still be, Do not the great and comprehensive powers of the Court of Chancery, in relation to fraud and trusts, necessarily confer the right to come in aid of a court of law, by compelling the trustee to pay over to the creditor, the funds on which he has no claim, nor any right to withhold? It will be recollected, that *Hadden*, the trustee, admits the amount of money in his hands belonging to *Davis*, at the time the bill was filed, and when his appearance was entered. His honor the chancellor has decreed the payment of that sum, to be distributed ratably among the respondents, in proportion to the amount due on their respective

udgments. If courts of equity in *England* have acted upon this principle, it will greatly fortify and support the inference I have drawn *from the general powers of the court; and, although it may appear that the doctrine has been questioned in some modern decisions, they cannot be regarded as authority. When they are opposed to cases adjudged prior to our revolution, it must be kept in mind, that the law, as settled by *English* adjudications at the time we adopted the common law, cannot be departed from, until those adjudications are clearly shown to be erroneous. The earliest case I have met with, is that of *Angel v. Draper*, (1 *Vernon*, 399.) decided in 1686; the plaintiff had obtained judgment at law, and then filed his bill, alleging, that the defendant, upon pretence of a debt due to himself, and to prevent the plaintiff's having the benefit of his judgment, had got goods of the defendant, of great value, into his hands, and prayed an account and discovery; the defendant demurred, because the plaintiff had not alleged that he had sued out a *fi. fa.*;—for, until he had so done, the goods were not bound by the judgment, nor the plaintiff entitled to a discovery or account. The court allowed the demurrer, on the ground, that the plaintiff ought to have sued out execution before he brought his bill. It does not distinctly appear, whether the goods remained unsold, so that the execution would have been a lien at law, or whether they had been converted into money; and, therefore, the case does not fully come up to the one under consideration. It may, however, be inferred, that the chancellor denied the relief, on the ground, that no execution had issued, without inquiring whether it could have been a lien or not; making the relief to depend on a condition precedent, to wit, that the plaintiff had done all that was practicable at law; this would have appeared, had a *fi. fa.* been sued out, and returned *nulla bona*. I am the more inclined to believe this was the principle of the decision, because, on that ground, it seems to present a case for equity jurisdiction; the powers of a court of law not being sufficient to afford a complete remedy.

In *Balch v. Wastall*, (1 *P. Wms.* 445.) decided in 1718, *Vernon*, of counsel for plaintiff, cited a case where Lord *Nottingham* held, that one who had a judgment, and had lodged a *fieri facias* in the hands of the sheriff, to which *nulla bona* was returned, might, afterwards, bring a bill *against the defendant, or any other, to discover any of the goods or personal estate, and, by that means, to affect the same; but he must first go as far as he could at law, by delivering the writ of *fi. fa.* and getting it returned.

The case of *Taylor v. Jones*, 2 *Atk.* 600. (1743) decides, that property not tangible by a *fi. fa.* will be reached by a court of equity. The bill was filed by simple contract creditors, to compel the payment of their debts out of stock vested in trustees, for the benefit of the defendant for life, of his wife, for life, and afterwards for the benefit of his children. The settlement was held fraudulent and void, and the master of the rolls decreed the stock to be sold and applied to the creditors. If rightly decided, this case disposes of the objection, that money in the hands of a trustee cannot be subjected to the respondents' demand; for if stock

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could be sold, and the money applied, it follows, that goods converted into money can claim no exemption. This case is important to show that the nature of the property sought to be recovered, interposes no formidable barrier; and for this purpose it is an authority. The counsel for the appellant contended, that the principle of this decision had been overruled in all the cases, and cited 3 *Atk.* 192. and 4 *Johns. Ch. Rep.* 671. So far as it sanctions the right of a simple contract creditor to file his bill, at once, without showing an execution, to give him a legal preference, which he has pursued to every available extent at law, the objection may be well founded; for I do not find in the report, that any execution had been issued, or even a judgment entered. It is silent on this point. The master of the rolls speaks of an agreement, "that if the plaintiffs would allow the defendant two years to pay his debts, he would give a warrant of attorney to confess a judgment; and then observes, that whether the creditors had any specific lien is not material; for as soon as the judgment was entered, it would have been a specific lien." Now, whether any judgment was entered on the warrant of attorney, is not asserted; but if there had been a judgment, the master of the rolls observes, that would have been a specific lien. This position, it is admitted, cannot be supported; for a judgment is no lien on stock in the name of a trustee. But it is not necessary to sanction the principle, that simple contract creditors can, in the first instance, without recourse to a court of law, reach property of this description, by bill in equity: for here an execution has been returned *nulla bona*. With this concession, still the case of *Taylor v. Jones* remains an authority, that stock vested in trustees may be directed to be sold and applied to the payment of debts. In *Horne v. Horne*, (*Ambler*, 79.) decided in 1749, the plaintiff had judgment at law, and execution returned; he then filed his bill to have satisfaction out of stock in the name of trustees. After filing the bill, the defendant was arrested on a *ca. sa.* The bill was dismissed; Lord *Hardwicke* observing, "that at law the body taken on *ca. sa.* is a satisfaction; you cannot afterwards take his goods." Without reference to the note of the reporter, who says, that if the plaintiff had not taken out a *ca. sa.*, the bill had been proper to subject the stock in the hands of the trustees, I think it manifest, from the language of Lord *Hardwicke*, that the only objection was the *ca. sa.*; if that had not existed, it seems to be treated as a plain case for relief. It may also be inferred, that although a *fi. fa.* is necessary, it is not indispensable, to show a lien at law, but that the party had proceeded as far as he could before he came into equity. A *fi. fa.* can create no lien on stock in the hands of a trustee. For that purpose, it is useless: but it is a prerequisite, to enable equity to afford the relief which justice so clearly demands.

The case of *Patridge v. Gopp*, in 1758, (*Ambler*, 596.) is also much in point; it decided, that money in the hands of a donee might be reached. The gift was declared fraudulent within the 13th *Elizabeth*. The doctrine laid down was, "that no man has such a power over his own property, to dispose of it so as to

defeat his creditors, unless for consideration." Neither in the argument of counsel, or the opinion of the lord keeper, is there a difficulty suggested, that equity could not reach property of this description; the objections to the relief were on other grounds. In *Scott v. Scholy*, (8 *East*, 435.) it was held, that a mere equitable interest could not be taken on a *fi. fa.* But Lord *Ellenborough* observed, there was a remedy to be applied in another court, upon a bill to be filed by the judgment creditor.

*In the case now before us, it will be recollected, that the respondents obtained judgment against *Davis*, and issued writs of *fi. fa.*, on which the sheriff returned *nulla bona*. It was not necessary to prove what steps were taken by the sheriff to discover property, because, the return is proof, that all reasonable diligence was used, according to the established rule, that, until the contrary appears, the officer is presumed to have done his duty. (19 *Johns. Rep.* 345.) It follows, then, that the judgment creditor must go into equity to obtain possession of the equitable interest of his debtor. I cannot too much approve the justice and morality of the rule, laid down by his honor the chancellor in *M'Dermutt v. Strong*, (4 *Johns. Ch. Rep.* 690.) "that if the creditor has taken, and exhausted all the means in his power at law, he will be entitled to the aid of a court of chancery, to discover and apply the property to satisfy his execution." The preceding cases have, by late adjudications in *England*, been questioned and overruled; but it is for this court to decide how far they are satisfactory, and justify a departure from the ancient landmarks of the law. Whatever may be the result, I think I am warranted in saying, that on one side we find a rule frequently acted upon, and never drawn in question, as far as I have discovered, for nearly a century, supported by its manifest equity, and, as I apprehend, shown to be within the power and jurisdiction of the court; on the other hand, a new rule, to be regarded so far as it shall appear to be correctly laid down, but not to be followed on the ground of binding authority. I am well convinced, that the doctrine recognized by the chancellor's decree, was the law of the land on the 19th of *April*, 1775, and that its operation will be salutary in its consequences. Had not the new doctrine emanated from so highly respectable a source, I should very much incline to consider it an innovation.

In *Dundas v. Dutens*, (1 *Vesey, jr.* 196.) the bill prayed, that certain stock might be sold, and the proceeds applied to satisfy creditors. Lord *Thurlow* does not profess to discuss the subject, but puts a question, "Is there any case where a man, having stock in his own name, has been sued for the purpose of having it applied to satisfy creditors? *Those things, such as stock, debts, &c., being choses in action, are not liable; they could not be taken on a *levari facias*." The whole of this is a *dictum*. If I have rightly understood the former cases, it does not appear to be indispensably necessary, that the property might be taken on execution; but the broad principle is supported, that stock may be reached in equity, where the plaintiff has pursued his remedy, as far as he can, at law; and in some of the cases, it had been reached by simple contract creditors

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In *Caillaud v. Estwick*, (1 *Anst.* 381.) a bill was filed to assist a judgment creditor of Lord *Abingdon*, who had assigned his life estate in a lease, in trust, to receive the rents and profits, and pay a moiety to certain creditors, and the other moiety to Lord *A.* The Court of Exchequer refused to assist the creditor, to reach the share reserved to Lord *A.* The ground of that decision seems to be, that as stock in the funds, or in the hands of a trustee, cannot be taken on a *fi. fa.*, so neither could they be taken by any process out of equity. It is evident, the court proceeded on the ground taken by Lord *Thurlow*, to which I have referred. So, also, in 9 *Vesey*, 189. and 10 *Vesey*, 368. there are dicta of Lord *Eldon*, that chancery does not give execution against stock, *eo nomine*, upon which there is no lien, and that it has no jurisdiction in aid of the infirmity of the law; Lord *Thurlow*, in *Dundas v. Dutens*, is referred to. As to all these late adjudications, differing from Lord *Hardwicke*, there is no examination of the old cases, no reasoning to show that the old rule was inconvenient or mischievous, no authorities cited in opposition. Lord *Thurlow* first questions the doctrine; and if a *dictum* can overthrow it, I admit it has been done. The subsequent cases have followed the same rule, and however correct those decisions may have been, we are not favored with any reasoning or authority in their support.

The result of this examination is, that the decree of his honor the chancellor is warranted by the established principles which govern in a court of equity. In the course of the argument, something was said as to the inconvenience of this rule in practice. If property not tangible by an execution is placed in the hands of a trustee, is there any *hardship in requiring him to pay it to the creditor, instead of the *cestui que trust*?

If the transaction is a fair one, and not fraudulent, the court will protect the rights of the trustee, so that he sustain no loss. If he is liable, by the terms of his trust, to pay the money in his hands on demand, no injustice is done, if the same is enforced by the decree of a court. If he holds the trust property, and is to restore it in a given time, the court will not disregard the terms of his liability, but protect him in all his just rights: while they cause justice to be done to the creditor, they will not impose on the trustee any additional responsibility. If he is necessarily subjected to costs, the fund in his hands will be applied for his indemnity; if he is sued at law by the debtor, while the creditor calls on him in chancery, and he thereby becomes exposed to a double recovery, he may protect himself by bill of interpleader. Whatever expenses are necessarily incurred in his defence would form a proper item for allowance, out of the fund committed to his charge. If the property consists of *choses in action*, the principle here decided will equally reach them, by compelling the debtors to pay to the creditors suing for relief. If the property sought to be reached consists of *stock*, cannot the court direct a transfer and sale, for the benefit of creditors? The principle now to be settled goes to that extent, and may be executed without oppression or material inconvenience. The doctrine is calculated to lessen the temptation to fraud, when it is seen that a court of equity is armed with legit-

imate power, not only to detect fraud in its most secret recesses, but to wrest from the dishonest debtor his property, not liable to execution, in whosoever hands it may be placed. But it has been urged, that it is not necessary for a court of chancery to exercise this power, as the creditor may obtain relief by proceeding under the insolvent act. If an effectual remedy could be had under that act, it does not affect the present question; it proves that there is a concurrent remedy; but that remedy is not effectual, as I shall briefly endeavor to show.

By the act to amend the act for giving relief in cases of insolvency, (sess. 40. ch. 55.) if a debtor has been imprisoned *for sixty days on execution, any creditor whose debt is not less than 25 dollars, may apply to a judge for an order, that the creditors show cause on a certain day, why an assignment of the debtor's property should not be made. If, on the day appointed, the debtor delivers an account of his creditors, and his estate, and two thirds of the creditors join in the request, and the debtor assigns his property, he may be discharged; but if two thirds of the creditors do not request, he cannot be discharged, and no assignment can be directed. It will be seen how very inadequate is the remedy, derived from this statute; no proceeding can be instituted until sixty days after the debtor is confined; then eight weeks are allowed to show cause; during this period the debtor may call in his trust property, and convert it into money, or place it in the hands of some secret trustee, and refuse to render any account. Assignees may, at length, be appointed, after the fraudulent debtor has had sufficient time to place his property out of their reach. As soon as the debtor becomes apprized that his creditor is about to proceed under this act, he can withdraw his funds from the hands of his trustee, and that trustee may, with entire safety, pay to the debtor, or to whomsoever he appoints. In chancery, (1 *Johns. Ch. Rep.* 566.) after filing the bill, and service of subpœna, the trustee would be affected by notice; if he parted with the trust property, it would be at his peril. The emendatory act has somewhat improved the system in relation to cases of insolvency, but has no pretensions to be considered as giving an effectual remedy to reach the debtor's property; and even that remedy is liable to be defeated, unless two thirds of the creditors agree to act in concert. Having, as I conceive, shown the unquestionable jurisdiction of the court, on general principles, as well as by the authority of adjudged cases, and that a failure of justice would follow the abandonment of the plain path before us, I have no hesitation in saying, the decree of his honor the chancellor ought to be affirmed.

PLATT, J. The *gravamen* of the bill is, that *Davis* and *Hadden* conspired to defraud the creditors of *Davis*, by *placing the goods of *Davis* under cover, so as to screen them from execution, and to enable *Davis* to enjoy and control the property, in defiance of his creditors. I do not understand (as was assumed by the counsel for the appellant) that the chancellor has proceeded on the broad ground, that the Court of Chancery has jurisdiction to

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reach all the *choses in action* of the debtor, so as to subject them to execution, or render them thus available to creditors. The question is not, whether the appellant, *Hadden*, was indebted to *Davis*, and, therefore, bound to respond to the creditors of *Davis* but whether *Hadden* has been guilty of an actual or constructive fraud, in aiding *Davis* to conceal and dispose of his property, to the injury of *Davis's* creditors. If he voluntarily lent himself for such purpose, and has ministered to fraud, I am unwilling to admit, that a court of equity is incompetent to afford relief.

The appellant, in his answer, expressly "denies, that there ever was any fraudulent combination between him and *Davis* to delay or defraud the respondents in any wise whatsoever." But, in the same answer, he admits a series of facts, from which both law and equity impute fraud. He admits, that he consented to take an assignment from an insolvent debtor, not only in payment of his own debt, (which he had a right to do,) but of all the residue of his goods; that he agreed to convert them into money, and to hold it for the benefit, and subject to the control of the debtor, after offering to the creditors a composition of five shillings in the pound, which they rejected; that he sold those goods at auction for 1,486 dollars and 17 cents; that he had paid part of that money to the debtor, and held the residue subject to his order.

Now, after detailing these facts, it is in vain for the appellant to swear that there was no fraud in the transaction. There is no ground to charge him with perjury; but he judged incorrectly, in drawing the conclusion from his own premises. It is like an answer, admitting that the defendant exacted ten per cent. per annum, for the loan of money, but denying that the contract was corrupt or usurious. It is the office of a court of chancery to instruct and guide the consciences of such men.

The Supreme Court of this state gave an exposition of the statute of frauds, in the case of *Hyslop & Campbell v. Clarke*, (14 *Johns. Rep.* 458.) upon a state of facts very similar to the case now before us. It was an action of trespass, for taking goods in possession of the plaintiff; and the defendant justified under a *fi. fa.* in his favor against *Wilbur & Barnet*. The plaintiffs gave in evidence an assignment to them, by *Wilbur & Barnet*, of the goods in question, *in trust*, to convert them into money; and, out of the avails, *first*, to satisfy a debt due to *Hyslop & Co.*; *second*, to pay all the other creditors proportionally, on condition of their executing releases of their respective demands; and in case the creditors, or any of them, should refuse to give such releases, then the trustees were directed not to execute that trust; *third*, in case of such refusal of the creditors, or any of them, to give such discharge, then in trust, (after paying the debt to *Hyslop & Co.*) to pay the whole of the avails of the property to such of the creditors as the debtors (the assignors) should appoint; *fourth*, to pay the *overplus*, in any event, to the debtors themselves; and the court held, that although a debtor may lawfully prefer one of his creditors to another; yet that this was an attempt to keep the property in the power of the debtors, to enable them to give such preference at a future period, and to compel their creditors to

acquiesce in the terms offered them; that the assignment, as regarded the *other creditors*, was void by the statute of frauds; and that *part* being illegal and void, the whole must be void: and that the assignment could not be used by *Hyslop & Co.* to protect the property in their hands, against the executions of other creditors; and there was judgment accordingly for the defendant.

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The case now before us, is still stronger against the appellant, because this assignment is not coupled with *any valid trust*, such as the payment of his own debt out of that fund; the confidential debt due to him having been satisfied, independent of the assignment of the *residue* of the goods. His being a general creditor for 500 dollars, was *not sufficient to support the general assignment. He had a right, if he chose, to accept five shillings in the pound for his own debt of 500 dollars; but that was clearly not the object of this assignment. It was intended as an instrument of coercion against his refractory creditors. Suppose the goods covered by this assignment had remained *unsold* in the hands of the appellant, when the sheriff received the *fi. fa.* against *Davis*, can there be a doubt that they would have been liable to such execution? We must shut our eyes, not to see, that the real understanding and intention between *Davis* and his assignee, were, to place the property out of the reach of the creditors, and to keep them at bay; at least such was the direct tendency and effect. Here was property liable in itself to execution against the debtor, which the appellant agreed to take into his possession, and to cover with his name, and thereby screen it from such execution. Is it possible, that such a scheme may be practised with impunity and success? If sanctioned by this court, it would, in a great measure, destroy the remedy by *fi. fa.*, for the collection of debts; it would be *optional* with every debtor, to submit to such compulsory sale, or to assign his property in trust to a friend, and thereby secure it for the benefit of himself and his family. The remedy by *ca. sa.* is so expensive, and generally so lax and *ineffectual*, that it has become little more than *nominal*; and is sinking into disuse. It is, therefore, highly important, that the remedy by *fi. fa.* should be vigorously and efficaciously maintained.

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If the assignment is to be deemed *fraudulent*, the creditors are, in my judgment, as much entitled to the *avails* of the goods, if sold, as they would be to levy on them by execution in the hands of the assignee. . If the simple act of converting them into money, would afford protection to all who were concerned in the fraud, an immediate sale would always follow such an assignment, and justice would be eluded. The jurisdiction of chancery is *suppletory*, and in aid of the common law process; and, if confined to cases of fraudulent assignments, I perceive nothing dangerous or alarming, in the exercise of such a power; on the contrary, *it seems wise and salutary, in giving full and fair effect to the writ of *fi. fa.*

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On examining the cases and authorities cited on the argument, there appears such a contrariety of decisions and *dicta*, in the

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English courts, on the point before us, that I feel at liberty to decide it upon sound principles of justice and public policy, as a case of first impression. The reason, probably, why this point has remained unsettled, and has, indeed, received so little attention in the *English* courts, is, that they have a bankrupt law, which affords an easier and more summary remedy, than by bill in chancery; and the fact, that we are destitute of such a law, renders it essential to the due administration of justice, that we should sustain the jurisdiction exercised by the chancellor in this case. But I am not prepared to extend this doctrine to any other cases than those, wherein the trustee received goods *liable in themselves to execution*, under circumstances which imply fraud, in fact, or in law, as against creditors. In an abstract view, it may appear proper to extend the remedy in favor of creditors, to every *chose in action* of the debtor. But, in my judgment, such power has not yet been conferred on our courts of justice; and it will be the appropriate office of a bankrupt law, or some other legislative provision, to afford such a remedy. I feel that we are treading on new ground, and I am unwilling to commit myself beyond the case now before us.

My opinion is, that this decretal order ought to be affirmed.

SPENCER, Ch. J., said, that he was of opinion that the decree ought to be affirmed, on the principles and authorities stated in the opinion delivered by Mr. Justice *Woodworth*, in which he fully concurred.

† Nov. 12th.
For affirming
20; for reversing 8.

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This being the opinion of a majority of the court,† the following decree was thereupon entered: "Counsel having been heard in this cause, and deliberation being thereupon had, and a majority of the court concurring in the opinion delivered by Mr. Justice *WOODWORTH*, It is ORDERED, ADJUDGED and DECREED, that the decree of the Court of *Chancery, in this cause, be affirmed, and that the appeal be dismissed; and that the appellant pay to the respondents their costs in defending this appeal, to be taxed, and that the record be remitted to the Court of Chancery, to the end that this decree may be carried into execution."

Decree of affirmance.

JOHN B. MURRAY and JAMES B. MURRAY, *appellants*,
against
JOHN G. COSTER, LEWIS LARUE, and JOSEPH SANDS,
Assignees of the Columbian Insurance Company, *respondents*.

Where there is
a joint purchase
of goods, and
one of the pur-
chasers takes
the whole
goods, and

APPEAL from the Court of Chancery. The bill in the court below was filed June 23, 1821. *The Columbian Insurance Company* insured 10,000 dollars, on sugars, on board the ship *Egeria*, from *New-York* to *St. Petersburg* or *Archangel*. The voyage having been broken up at *Copenhagen*, the cargo was abandoned

to the insurers, who paid the loss, and the property was assigned to them, by the insured, on the 3d May, 1811. The sugars were sold, and the proceeds received by *George Dickinson*, agent of the insurers, at *Copenhagen*. In the summer of 1813, *G. D.*, as agent of the insurers, and *James B. Murray*, acting for the *appellants, merchants, under the firm of *John B. Murray & Son*, made a joint purchase of thirty-five boxes, or cases, of linens at *C. G. D.* advanced one third of the purchase-money, out of the proceeds of the sugars; and it was agreed, between *G. D.* and *James B. M.*, that the linens should be shipped on the joint account of the persons interested therein; and the insurers, as owners of the sugars, were entitled to one third of the proceeds, or that proportion of the goods, paying one third of the expenses. And it was agreed, that if the linens were sold by the house of *J. B. M. & Son*, no commissions were to be charged on such sale. The linens were shipped, under the direction of *James B. M.*, for the *U. S.*, and arrived in safety, and were delivered to the appellants; who sold the goods, and received the proceeds. On or about the 1st June, 1814, the respondents presented to the appellants an order, from *G. D.*, for the delivery, to them, of one third of the linens, or, if sold, one third of the proceeds. The defendants admitted the receipt and sale of the linens, and, a few weeks after the presentment of the order, rendered an account of sales, charging 1001 dollars and 25 cents, for insurance, and 1153 dollars and 7 cents, for commissions; which charges, the bill alleged, were unwarrantable and unjust, as no insurance was effected, and, by the agreement between the agents of the parties, no commissions were to be charged. The respondents objected to the charges, but the appellants refused to pay over, or account for any part of the proceeds of the linens, unless the charges for insurance and commissions were allowed. That the appellants, immediately after receiving the proceeds, applied the same to their own use, and have always mingled the moneys arising from the sale with their own money, and employed the same in their own business. That frequent applications were made to the appellants, for payment, which proved fruitless; and in May, 1821, the respondents made a final application, stating to the appellants, that they had directed their solicitor to prosecute their claim. That the appellants then proposed an interview between the counsel of the parties; that the interview took place, and, after repeated negotiations, the counsel for the appellants proposed that they should pay to the *respondents, the principal of one third of the proceeds of the linens, without interest; but the respondents declined accepting the proposal.

The appellants pleaded the statute of limitations, in bar of the defendants their share of the goods, or the proceeds; and the defendants having rendered an account of the sale, the right of action was then perfect.

But where the defendants, in their answer accompanying the plea, admitted that they had not been called upon to pay to the plaintiffs, their proportion of the proceeds, during six years prior to the suit; and that, to avoid litigation, they had, through their counsel, offered to pay to the plaintiffs, their share of the proceeds, without interest; but, at the same time, insisted that they were discharged, by length of time, from all liability, and expressly reserving their right to avail themselves of the statute of limitations, in case the offer of settlement was refused: *Held*, that this was such an acknowledgment and admission of the debt, as defeated the operation of the statute. (a)

(a) *Vid. Sayre v. Austin*, 3 *Wendell's Rep.* 496. *Wood v. Hickok*, 2 *Ibid.* 501.

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agrees to account to the other for his share of them, or of the nett proceeds, and to charge no commissions in case of sale, this is not "a trade of merchandise, between merchant and merchant, their factors, or servants," within the meaning of the exception in the statute of limitations. And where a bill in equity was filed for an account against the party who had received and sold the goods, after a lapse of six years, the statute of limitations was held to be a good plea: for it is not the case of a technical trust, of which a court of chancery has peculiar and exclusive jurisdiction. Nor are the defendants, in that sense, to be considered as trustees; for the plaintiffs had a perfect remedy, at law, against them.

The statute, in

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such case, begins to run from the time the plaintiffs demanded of the

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respondents' claim; and in their *answer*, they denied that they had within six years prior to filing the bill, made any offer, tender, promise, or agreement, to pay to the respondents, any sum of money whatever, for, or on account of the said linens, or in any wise to account concerning the same; except only, in respect to the negotiation between the counsel of the parties, as afterwards stated by them. And they said further, that during the period of six years, prior to filing the respondents' bill, they were never called upon by the respondents, or by any person in their behalf, to pay or account for the proceeds of the said linens; and they had no reason to suppose that the respondents, or any person invested with the rights of the *Columbian Insurance Company*, would have accepted the proceeds of the said linens; but they were given to suppose, and did suppose, that the respondents intended to press against the appellants a claim for not proceeding in the voyage of the ship *Egeria*, to *Russia*, on the ground that the same was unnecessarily broken up at *Copenhagen*, &c. They admit, that, on the 26th *April*, 1821, their counsel wrote a note to the respondents' counsel, stating that they were instructed by the appellants, to ask of the respondents a statement, in writing, of their claim, and that, being anxious to avoid litigation, they instructed their counsel to offer the respondents' counsel, to pay one third of the proceeds of the linens, without any deduction for commissions, and which offer was accordingly made; but that the appellants' counsel, at the same time, expressly insisted, that the appellants were discharged from all liability to the said claim, by the lapse of time, and by virtue of the statute of limitations; and that the offer was made under a reservation of their right to avail themselves of the statute, in their defence against the claim, in case the offer should be refused.

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And they expressly denied, that they had, at any time, within six years before filing the bill, in any manner, made any offer, promise, or admission, express or implied, to the respondents, or any other person interested, in relation to *the said linens, or the proceeds thereof, except as above set forth.

The cause was heard on the pleadings; and the chancellor, on the 11th of *December*, 1821, made a decretal order, "that the said plea, and the answer accompanying the same, be overruled; and that the defendants put in a full and perfect answer to the bill, within four weeks," &c. And from this decree, an appeal was entered to this court.

The CHANCELLOR assigned his reasons for the decree, for which see 5 *Johns. Ch. Rep.* 522. S. C.

R. Sedgwick, for the appellants, contended, 1. That this case did not come within the exception in the statute of limitations, (1 *N. R. L.* 184. sess. 24. ch. 183. s. 5.) (a) of actions concerning the trade of merchandise, between merchant and merchant, their factors or servants: and such, after a very full examination of the cases, was the opinion of the chancellor in the court below

(a) 2 *Rev. Stat.* 295.

2. Can this, then, be regarded as a *trust*, and so forming an implied exception to the statute? Though the term *trust* is not to be taken in too broad a sense; yet, there are many trusts which clearly fall within the statute; thus, loans of money or goods, and bailments of various kinds, are trusts. The case of *Godfrey v. Saunders* (3 *Wilson*, 94.) was a suit at law, and the question, whether it was such a *trust* as did not come within the statute, could not arise; so, the case of *Stiles v. Donaldson* (2 *Dallas*, 264.) has no relation to a *trust*, properly speaking, but is applicable merely to the first point, whether it was an action concerning trade of merchandise, between merchant and merchant. In equity, the statute of limitations does not apply to an express or direct trust; (1 *Madd. Ch.* 365, 366. 3 *Johns. Ch. Rep.* 216.) though the Court of Chancery may adopt and apply it to equitable demands, in cases analogous to those in which it is applied at law. (2 *Madd. Ch.* 244. 10 *Vesey*, 466, 467.) Length of time may be pleaded to *implied* trusts. (17 *Vesey*, 96, 97.) Where the statute of limitations might be pleaded to an action at law, it is a good bar in equity. The case of *Martin v. Delboe* (1 *Mod.* 70. S. C. 1 *Vent.* 90.) shows that the present case is not a trust. (2 *Mod.* 311, 312. 6 *Vesey*, *580. 585. 15 *Vesey*, 198. 205. 209. 2 *Atk.* 610.) Executors and administrators are trustees, yet the statute of limitations applies to them. (*Leigh v. Thomson*, 1 *Barnw. & A'd. Rep.* 625.) But in case of a legacy, for which the legatee cannot sue at law, the doctrine as to trusts applies, and this marks the distinction. For where there is a remedy at law, the statute may be pleaded.

The counsel also cited and commented on the following authorities: 1 *Equ. Cases Abr.* 304. tit. *Limitations*, A. 4 *Bac. Abr.* 473. tit. *Limitation of Actions*, D. 2. 3 *Johns. Ch. Rep.* 190. 1 *Merivale's Rep.* 495. 3 *Johns. Cases*, 384. *Prec. in Ch.* 518. 3 *Mass. Rep.* 201. 1 *Taunt.* 571. 12 *Mod.* 444. 1 *Bl. Rep.* 453. 5 *Binney*, 573. 11 *Johns. Rep.* 146. 15 *Johns. Rep.* 511. 8 *Cranch*, 72. 1 *Sergt. & Rawles' Rep.* 179. 11 *Mass. Rep.* 452. 13 *Johns. Rep.* 238. 3 *Camp. N. P. Rep.* 33.

G. Griffin, contra, made the following points. 1. That this was an action concerning the trade of merchandise, between merchant and merchant, their factors and servants, and excepted from the operation of the statute of limitations.

2. That the appellants are trustees, and their claim relates to the execution of a trust, and, therefore, not within the statute.

3. That the answer accompanying the plea denies that any demand was made on the appellants, until just before the respondents filed their bill; and, no cause of action accruing until a demand was made, the statute did not, until that time, begin to run.

4. The answer of the appellants virtually acknowledges, that the claim made and stated in the bill, is a subsisting and unsatisfied demand, and so avoids and defeats the operation of the plea.

5. That the answer did not fully and particularly deny the charges made in the bill, forming an equitable bar to the operation of the statute; and was, in other respects, insufficient.

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He said, that it was not necessary to enlarge on the first point, which might be considered as questionable, being embarrassed with so many conflicting decisions.

*As to the other points, he cited and commented on the following authorities: *Mitf. Pl.* 221. 3 *Johns. Ch. Cases*, 216. 1 *Fonbl. Equ.* 330. note. 3 *P. Wms.* 143. 2 *P. Wms.* 144. 9 *Mod. Rep.* 32. 1 *Bro. C. C.* 554. 3 *Johns. Ch. Rep.* 190. 1 *Meriv. Rep.* 495. *Prevost v. Gratz*, 6 *Wheat. Rep.* 481. 2 *Sch. & Lefr.* 633. 15 *Viner's Abr.* tit. *Limitation*, E. 2 *Freeman's Rep.* 156. 2 *Ventris*, 345. *Bunb. Rep.* 213.

There never was, probably, a case like the present. The appellants on the record, and on oath, admit that they owe the respondents the money, and that it has never been paid. The spirit, surely, of the statute, can never be made to extend to such a case. (4 *East*, 599. 604. note. 16 *East*, 419. 1 *Dick. Rep.* 153. 7 *Taunt.* 612.)

J. O. Hoffman, in reply, said, that every plea of the statute of limitations does, in effect, suppose the existence of a debt; but it shows, that by the statute, the plaintiff's remedy is gone. If the doctrine which is contended for, that the appellants are trustees, and, therefore, the statute does not apply, be well founded, then, there is hardly any transaction between man and man which does not come within its scope. Every man, in his dealings with another, is, in some sort, a "factor or agent." But is a factor or agent such a trustee, that he is not to be affected by the statute? In *Sturt v. Mellish*, (2 *Atk.* 610. 612.) a case not noticed by the chancellor, Lord Hardwicke decides this very question. He says, "I agree, if it is a trust, it would not be within the statute; but there is no color to call it so here; for a trust is, where there is such a confidence between the parties, that no action at law will lie, but is merely a case for the consideration of this court; and every bailment might as well be said to be a trust as this." To this authority is opposed a short note of a case in the Exchequer, from *Bunbury's* reports, a book of no authority. No doubt, in cases of pure trusts, which are the creatures of a court of equity, and where there is no action at law, the statute does not apply. The action of *account* is expressly mentioned in the statute; and that is an action which lies against a factor or agent. So *assumpsit* lies, in most cases, *where there is a promise to account. Though the statute may not, in terms, apply to a court of equity; yet, it has been virtually adopted in chancery, and courts of equity consider themselves bound, in obedience to the statute, to consider equitable rights, in all analogous cases, as bound by the same limitation.

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SPENCER, Ch. J. The questions raised on the argument, are.

1. Whether this is a case coming within the exception in the statute, as concerning the trade of merchandise between merchant and merchant, their factors or servants.

2. Whether the appellants are trustees; and whether the claim upon them relates to the execution of the trust; and, therefore not within the statute.

3. From what time the statute begins to run ; whether from the demand of payment, in 1821, or from the time the sales were completed, and the rendering the account thereof, on the 8th of *July*, 1814.

4. Whether the answer admits the claim to be subsisting and unsatisfied, and thereby defeats the operation of the statute.

1. The chancellor has examined the first question very elaborately, and his conclusion upon the whole is, that assuming the case before him to be one that concerned the trade of merchandise between merchant and merchant, the statute was well pleaded, and the case does not fall within the exception. In the case of *Ramchander v. Hammond* (2 *Johns. Rep.* 200.) the Supreme Court decided, that although there was a verbal difference between our statute of limitations and the statute of *James I.*, yet that our statute, in a case concerning the trade of merchandise between merchant and merchant, must be confined to actions on open or current accounts, and that the exception did not extend to accounts stated. That case did not call for a decision of the question, whether the exception did, or did not, embrace a case, where the items were all on one side. Whether the statute is at all applicable to a case of mutual dealing and mutual credits between merchant and merchant, is a question not now necessary to be decided, *because, the present is not a case of that kind. On the part of the respondents, there is no account at all. This is a case of an account merely on the part of the appellants ; there is no selling or trading ; it is a case of a joint purchase of goods, where one of the purchasers takes the whole goods, and is to account for one third of the proceeds. In such a case, where the items of an account are all on one side, in my judgment, it is not within the reason or principle of the exception, which must have intended open and current accounts, where there was mutual dealing and mutual credits. I should very much doubt, too, whether an insurance company, whose institution is with very different views and ends, could be considered as a merchant. I concur, therefore, on this point, and for the reasons I have stated, in the result to which the chancellor came, that the statute is well pleaded.

2. Is the claim to be considered a *trust*, and are the appellants to be regarded as trustees ?

If it be a trust, and if the appellants are to be regarded as trustees, the conclusion is certain, that the statute is no bar. When I say trust, I must be understood as using the term in its technical and legal sense. It is to be observed, that, strictly speaking, the statute of limitations does not apply to a court of equity. That court has adopted it as a fit and convenient rule, but with its own restrictions, which are, that in cases of fraud and trust, it shall not apply. The chancellor, in *Decouche v. Savetier*, (3 *Johns. Ch. Rep.* 215.) has gone fully into the subject, and has shown, what indeed could not have been denied, that the statute affords no bar in case of a trust.

The cases cited by the chancellor (*Godfrey v. Saunders*, 3 *Wilson*, 94. and *Stiles v. Donaldson*, 2 *Dallas*, 264.) were not decided upon the principle of a trust, but they turned exclusively upon the question, whether the accounts claimed in the one case,

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and set off in the other, were barred by the statute of limitations on the exception in the statute, of accounts between merchant and merchant. If they are entitled to any weight, it is on the point already discussed. In the broadest sense, any confidence reposed by one man in another, is a trust; but we cannot admit this *as a criterion of trusts cognizable in equity. If one lends another a sum of money, there is a confidence reposed, that it will be faithfully restored. So, if one man deposit with another his goods and chattels to keep for him, and to be restored whenever they are required, this is a species of trust and confidence. The instances of such trusts might be multiplied to a great extent. In the case of *Sturt v. Mellish*, (2 *Atk.* 610.) Lord *Hardwicke*, after stating, that if the case before him was a trust, it would not be within the statute of limitations, observed, there was no color to call it a trust, for a trust, he said, is where there is such a confidence between parties, *that no action at law will lie*, but was merely a case for the consideration of that court; and, he added, every bailment might as well be said to be a trust as that. The circumstance on which the plaintiff, in that case, relied, to make the case a trust, was, that he had executed to one *Villa Real*, to whom he was indebted, a letter of attorney, to recover certain sums of money due to him; and the bill was for an account with respect to these demands received by *Villa Real*. This decision is directly opposed to the case of *Sir E. Heath*, and *Henley and others*, (1 *Eq. Cas. Abr.* 303. and 3 *Ch. Rep.* and 1 *Ch. Cas.* 21.) which was the case of a bill exhibited against the prothonotaries of the *K. B.* to have an account of the money received by them, by an implied trust, *virtute officii*, to which the statute of limitations was pleaded, and the plea was overruled. There is another view of this case, which, I think, must be decisive. I perceive nothing which prevented the respondents from having a perfect and complete remedy at law. They had received the account of sales long anterior to the filing their bill, and the only objectionable charges, were the commissions and insurance. There were no perplexed or involved dealings to be examined into, and the items objected to, were matters of legal inquiry. I am aware, that courts of equity do take cognizance of matters of account, but not as upon a trust. They do so, because it is supposed, that courts of law could not give so complete a remedy as courts of equity; and, by degrees, they have assumed a concurrent jurisdiction. The same relief is given at law, in the action of account, as under a bill in equity. *The delay at law has transferred a very considerable portion of this jurisdiction to courts of equity. One of the grounds of this assumed jurisdiction, of which I do not complain, is, that a discovery is, also, necessary, and that, having once acquired jurisdiction, for the purpose of discovery, the court would entertain the suit for relief. Another ground is, that when the remedy at law is doubtful or difficult, equity will take cognizance. But when no discovery is necessary, and there is no doubt as to the remedy at law, I cannot think, that it is a case for a court of equity; and, I have no doubt, had the objection been made in this case, the chancellor would have dismissed the bill. All, however, I mean to deduce from this consid-

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eration is, that it is impossible, in a case like this, where there was ample remedy at law, that the change of the *forum* should produce such a change in the rights of a party; for, beyond all doubt, had the respondents sued at law, the appellants could have pleaded the statute; whether successfully or not, remains to be considered. I have, therefore, no hesitation in saying, that in a case where there is a concurrent jurisdiction in the courts of common law and of equity, the rule must be the same, and the statute of limitations may be pleaded with the same effect in the one court as the other. In cases of trusts and fraud, peculiarly, appropriately, and exclusively the objects of equity jurisdiction, according to the established doctrine, the statute cannot be pleaded. I forbear to enforce the opinion I have formed, by attempting to show the impropriety of a different rule, for I think it must be obvious, as applied in the different courts, in a case of concurrent jurisdiction; and my conclusion is, that this is not such a trust, as to preclude the plea of the statute of limitations.

3. The third point gives rise to the question, whether a demand of payment was necessary prior to the institution of a suit, and whether the right of action then first accrued. It cannot be doubted, that when the right of action became perfect, from that period the statute began to run.

As has been already stated, the bill charges, that on or about the first of *June*, 1814, the respondents presented to the appellants an order from *Dickinson*, and demanded the *equal third part of the linens, or, if sold, the third part of the proceeds thereof; that the appellants admitted they had sold the linens, and in a few weeks after the presentment of the order, the appellants rendered an account of the sales, a copy of which makes part of the case. These allegations are not denied in the answer accompanying the plea, and must, therefore, certainly, as regards the respondents, if not as regards the appellants, be taken to be true. The answer denies any accounting within six years prior to filing the bill, which was on the 23d of *June*, 1821, and virtually admits rendering the account as alleged. This demand of the goods, or the proceeds, (the goods having been sold,) if even a demand was necessary, gave the respondents a complete right of action; (1 *Taunt.* 571. 2 *Taunt.* 323.) and from that time the statute began to run; and this was more than six years prior to filing the bill.

4. The fourth point is, whether the answer admits the claim to be subsisting, and unsatisfied, and thereby defeats the operation of the statute. In *April*, 1821, the appellants, through their counsel, offered the respondents' counsel, to pay them one third of the proceeds of the linens, without deducting therefrom (or, in other words, giving up) the charge for commissions, explicitly stating, however, at the same time, that they were discharged from all liability by virtue of the statute, and that they reserved a right to avail themselves of the statute in their defence, if the offer was refused. Now, the question is, whether the admission of the existence of the debt, and that it had never been paid, under the circumstances of the case, is a waiver of the statute. After a review of the cases upon this subject, and particularly those decided

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in the Supreme Court, I am of opinion, that the distinct admission in the answer, that the appellants never were called upon by the respondents to pay or account for the proceeds of the linen, and that they had no reason to suppose that the respondents would have accepted the proceeds, together with the offer of payment, by the appellants, in 1821, renders them liable to pay the respondents, and defeats the operation of the statute. In the case of *Sands v. Gelston*, (15 Johns. Rep. 511.) I delivered the opinion of the court, and, as the case shows, contended successfully *against the correctness of many of the cases, upon the construction of the statute, decided in *Westminster Hall*. It was my anxious desire to rescue the statute from decisions which were pressed upon us, but which were not binding further than they comported with a just and sound interpretation of the statute. I considered the statute of limitations as the law of the land, and intended as a shield against stale and dormant demands, founded on the probability that, after the lapse of time limited by the statute, the party may have lost the evidence necessary to his defence. And, in that case, I observed, that I was "bound, by authority, to consider the acknowledgment of the existence of the debt within six years before the suit brought, as evidence of a promise to pay the debt." In the case of *Sands v. Gelston*, the whole amount of the defendant's admission was, that the plaintiff had never received what he claimed as a debt, and that if the defendant believed he had a claim in law or equity, he would submit the matter to reference, or compromise it; *but that, in his opinion*, the plaintiff had no such claim, and he was not entitled to it in law or equity, and therefore he would neither submit nor compromise. The court were unanimously of opinion, that this was not such an acknowledgment of the existence of a debt, as to authorize an inference that the defendant had promised to pay it within six years; because the defendant denied his liability, and denied the justice of the debt, either in law or equity; and I concluded my opinion in that case, by observing, "that, though, indeed, the defendant may admit, that what the plaintiff claims as a debt has never been paid, if he protests against his liability, it would be an outrage on common sense to infer a promise to pay, in the face of his denial of his liability to pay." But how stands this case? The appellants, after six years, offer to pay the whole demand, except the charge for insurance and interest. To be sure, they accompany that offer, with an assertion, not that they did not owe the debt, or that it ever had been paid, or denying the justice of the claim, but that if the offer was not accepted, they would rely on the statute of limitations. It will, at once, be seen. there is a total dissimilitude between this case and that of *Sands v. *Gelston*, and of *Lawrence v. Hopkins*, (13 Johns. Rep. 288.) and *Danforth v. Culver*, (11 Johns. Rep. 146.) In none of those cases was the existence or justice of the debt admitted; on the contrary, they were denied. The case of *Bryan v. Horseman* (4 East, 599.) bears strong analogy to the case before us. It was proved, there, that the defendant said, "I do not consider myself as owing Mr. *Bryan* a farthing. it being more than six years since I contracted. I have had the wheat, I acknowledge, and I have

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paid some part of it; and 26 pounds remains due." Lord *Ellenborough* said, they had looked into all the authorities, and whatever their opinion might have been, had the question been new, yet, after the long train of decisions, it was necessary to abide by the construction which had been put upon it, in conformity with which, they thought themselves bound to hold, that what was said by the defendant was a sufficient acknowledgment of the preëxisting debt to create an *assumpsit*, so as to take the case out of the statute. In *Leaper v. Tatton*, (16 *East*, 419.) it was proved, that the defendant, when applied to for payment, said, "he had been liable, but was not liable then, because the bill was out of date; the witness told him, the plaintiff would take the money by instalments; the defendant said, he would not pay it; it was not in his power to pay it." Lord *Ellenborough* said, that, as the limitation of the statute is only a presumptive payment, if his own acknowledgment, that he has not paid it, be shown, it does away the statute. *Bayley*, Justice, said, acknowledging his acceptance, and that he has not paid it, created a debt. Many other cases, some of which, I admit, push the subject to an unreasonable and extravagant length, might be cited, where the slightest acknowledgment, or even writing an equivocal letter, have been held to take the case out of the statute. In *Coltman v. Marsh*, (3 *Taunt.* 380.) the proof was, that the defendant said, "I owe you not a farthing, for it is more than six years since." The court held, very correctly, that it was no evidence of a new promise. In the case of *Rowcroft v. Lomas*, (4 *Macle & Selw.* 457.) which was commented upon in *Sands v. Gelston*, the defendant was sued on an accountable receipt, and it was proved, that when it was shown him, and he was asked if he knew any thing of it; he said he knew all about it: it was not worth a penny, and he should never pay it. He admitted his signature, and that he had never paid it, and never would, and added, besides, it is out of date, and no law shall make me pay it. Lord *Ellenborough*, in delivering the opinion of the court, that this did not take the case out of the statute, distinguishes, with great force, between that case and *Bryan and Horseman*. The cases, he said, have determined, that a debt, the existence of which is extinct through lapse of time, may be revived, by an acknowledgment, that it is unsatisfied; but there must first be an acknowledgment that it ever existed. Almost all the cases, he observed, upon this subject, go upon the same ground as *Bryan and Horseman*, where the defendant stood upon the statute, it being more than six years since he contracted; but, in the same breath, acknowledged he had had the wheat, and had paid only in part for it, and that part remained due. Every thing, he said, which the defendant then alleged, went to admit, in distinct language, the original foundation of the debt; only as to some part of it he stood upon the statute, on account of the lapse of time, the presumption arising from which was rebutted, by his admission that a part was unpaid. *Bayley*, Justice, in commenting on the case of *Bryan and Horseman*, said, that the defendant relied on the statute of limitations, but, in the same breath, admitted that 26 pounds were due; therefore, he had taken a wrong view of the statute, because the

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statute was not intended to protect a party from a debt acknowledged to be existing, but only where the presumption arising from the lapse of time is, that it never did exist, or, if it did, that it has been discharged; therefore, he says, when the defendant, in that case, admitted the debt, he admitted that this was a case, to which the statute, according to its spirit, did not apply. In the case of *Mountstephen and others v. Brooke and others*, (3 Barnw. & Ald. 141.) the defendant was a party to a covenant in a deed to a third person, which recited, within six years, the debt to be outstanding and unsatisfied. *Abbott*, Ch. J., said, the statute was passed to protect persons who were supposed to have paid the debt, but to have lost the evidence of such payment; *here, however, (he observed,) there is no such thing, for there is a solemn acknowledgment of the existence of the debt within the six years, the legal effect of which is, to raise, of itself, a promise to pay the debt; and when we consider that a court of equity is not bound by the statute, but have adopted it from analogy, and as a reasonable rule, this reasoning appears to me forcible and conclusive, and it directly applies to this case. Indeed, the case before us is a much stronger one, for the appellants have never asserted, that they did not owe the debt according to the account rendered, or that a cent of it had been paid; but they distinctly admit the justice and existence of the debt, and offer to pay it, and even to deduct the commissions which they had charged. In such a case, it is impossible to consider the statute as a bar, consistent with all the cases on the subject; and my conclusion is, that the decree ought to be affirmed.

PLATT, J., and WOODWORTH, J., concurred.

VIELIE, Senator. The first question which arises in this cause is, whether it is a case coming within the exception to the fifth section of the statute of limitations, made in favor of "actions which concern the trade of merchandise between merchant and merchant, their factors or servants."

In the consideration of this question, it is important to inquire how far the mutuality of the accounts between the parties, or the necessity of an account current, as distinct from a specific sale of merchandise between merchant and merchant, is material to entitle the party to the benefit of the exception. The decisions in the *English* courts on the statute 21 James I. (ch. 16. sec. 3.) are, in some measure, various, and many of them are, to my mind, very unsatisfactory. The only authority requiring the demands to be mutual, which I have been able to find, is a *dictum* of *Denison*, J., in *Cotes v. Harris*, (*Buller's N. P.* 149.) I say a *dictum*, because, by the loose and uncertain report of that case, it does not appear to have concerned the trade of merchandise between merchant and merchant; and although *Denison*, J., is made to say, "that the clause in the statute of *limitations extended only to cases where there were mutual accounts, and reciprocal demands between two persons," he also says, "but if there were only a demand by A., against B., in the common way of business, as by a tradesman

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on his customer, that cannot be called merchants' accounts." From this, I think it is fairly to be inferred, that the case was of the latter kind, that of a tradesman against his customer. And this appears more probable from what Lord *Kenyon*, who furnished the report of this case, says, in *Cranch v. Kirkman*, (*Peake's N. P.* 121.)

He there uses the case as authority for extending the benefit of the exception to other persons than merchants; for, in the very case then under consideration, and to which he applies the authority of *Denison, J.*, he overrules the objection, that the exception extends to no other description of persons than merchants.

If my view of these cases be correct, it does not very satisfactorily appear, that the rule requiring the accounts to be mutual, has ever been adopted in *England*, in relation to a case concerning merchants' accounts.

But if such a rule prevailed there, it may well be doubted whether it can properly be applied to cases arising under our statute. By the statute of *James*, "*such accounts* as concern the trade of merchandise," &c., are excepted; and from this phraseology, *accounts* being used in the plural number, the idea of the rule may naturally have arisen; but our statute excepts all "*actions* which concern the trade of merchandise," &c.; and, I apprehend, an action brought by one merchant against another, to recover the value of fifty bales of goods sold, as much concerns the trade of merchandise, as if there had been a reciprocal interchange of goods between them, leaving a balance of fifty bales upon one side or the other. And though the reasons founded upon public policy, and which produced the exception in favor of merchants, may not operate as strongly in the case of an action brought by one merchant against another to recover for a *single* bale of goods sold, still it cannot be denied to be as much within the letter and spirit of the exception, as if there had been fifty bales sold. If the one as immediately concerns the trade of merchandise as the other, why is it not *as much* within the exception to the statute? The amount is not so great, but principles are not governed by amount. The transaction in one case is not so complex as in the other. But was it the complicated nature of particular transactions, or the exigencies of trade, which, from its very nature, and the multiplicity and extent of its concerns, frequently requires a longer time to close its most simple affairs, than is required in the ordinary affairs of men, that induced the exception to the statute in favor of merchants, not as a particular description of citizens, but as persons engaged in the trade of merchandise? I think the latter.

Whether the cause of action must more immediately concern the trade of merchandise, or may be more remotely related to it, is another question which arises upon this branch of the subject. And here, it would seem to be a position founded in good sense, and sanctioned by authority, that the cause of action must be a direct and immediate concern of trade, and that whenever it is in any degree removed, the benefit of the exception is lost, and it comes within the operation of the statute, so as to be barred by it. Where a note is taken upon the sale of goods, or where an account is stated, and the balance ascertained and settled, it is no longer

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a concern of trade. The matter being closed, the reasons for the exception, arising from the exigencies of trade, no longer apply, and the cause of action is changed ; for the mere stating of an account, even though a note is not taken, is a merger of the original cause of action, and in that case an action cannot be maintained upon the implied assumpsit arising from the delivery of the goods, but the party must resort to an *insimul computassent*. (1 *Bac. Abr.* 281. tit. *Assumpsit*, G. 1 *Mod.* 205. 2 *Mod.* 43, 44. *Buller's N. P.* 129.) And it may be worthy of remark, that although some of the decisions in the *English* courts seem to be at war with the statute itself, and some of them are inconsistent with each other, yet most of them, where the statute has been allowed to bar the action, proceed upon the ground, that an account had been stated between the parties.

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Thus, in *Webber v. Tirill*, (2 *Saund.* 124. 127. note 5.) an account had been stated, and the argument of the counsel *there was, that the remedy had been changed, and the statute applied to the new remedy ; and this reasoning was adopted by the court. The same principle is recognized by *North*, Ch. J., and *Windham* and *Scroggs*, Justices, in 1 *Mod.* 270. and also in 2 *Mod.* 311, 312. 1 *Mod.* 70. 1 *Lev.* 298.

It is upon this principle, that a distinction has been made between accounts that are open and current, and accounts stated. The former have been held to be within the exception, while the latter have constantly been held to be barred by the statute. (*Ballantine on Limitations*, 71.)

When a note, therefore, is accepted for the balance of an account, or the account is stated, and a balance ascertained and agreed upon, the parties voluntarily, and by their own act, abandon the cause of action, which arose from and immediately concerned the trade of merchandise, and put the matter upon the footing of all other demands, for which an action of *assumpsit* will lie, even against a factor or receiver ; and in that case the statute becomes a bar as in ordinary cases.

At common law, no limitation of personal actions was known. (*Co. Litt.* 115.) And, but for the intervention of the statute under consideration, every person, without distinction, might have pursued the legal remedy for his demands, though twenty years had elapsed. That right still remains to all, unless inhibited by the statute, in derogation of what was before a right common to all. In its terms, the statute restrains the bringing of certain personal actions to the period of six years from the time they severally accrue ; but from this restriction are excepted, "actions that concern the trade of merchandise, between merchant and merchant, their factors or servants." Every action, then, that falls within this description, being excepted from the operation and effect of the statute, must remain as it stood before, untrammelled by any limitation or fixed period for its commencement.

If this be correct, it is inconceivable, unless through misapprehension, how Lord *Hardwicke* (2 *Vesey*, 400.) could say, that it was the intention of the statute "to prevent dividing the account between merchants, where it was a running account, when,

perhaps, part might have begun long *before, and the account never settled, and perhaps there might have been dealings and transactions within the time of the statute." Or how Lord *Northington*, (2 *Eden*, 169.) Lord *Rosslyn*, in *Crawford v. Liddell*, (6 *Ves.* 580.) and Sir *Wm. Grant*, in *Barker v. Barker*, (18 *Ves.* 236.) could say, that when all the transactions were over six years, the statute might as well be pleaded to merchants' accounts as others. For "merchants' accounts" either were within the exception or not, and if within the exception, most manifestly the six years had nothing to do with them any more than any other period of time that might be supposed. If not within the exception, the six years were an absolute bar in every case.

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Had the legislature intended such a construction, how very readily and naturally would the words, *when some of the items come within six years*, have been inserted! The intention would then have been clear and palpable; and the want of something of that, or a like import, is, to my mind, the strongest argument that no such thing was intended.

But when these cases are contrasted with that of *Catling v. Skoulding*, (6 *Term Rep.* 189.) decided by Lord *Kenyon*, and the judges of the King's Bench, it would seem, that between Lords *Northington* and *Rosslyn*, and Sir *Wm. Grant*, on the one hand, and Lord *Kenyon*, Sir *Wm. Henry Ashhurst*, and Sir *Soulden Lawrence*, on the other, the exception to the statute was completely annihilated. For, in the latter case, the Court of King's Bench decided, that where there are some items of mutual accounts within the six years, as between parties not merchants, and in a matter not concerning trade, it is sufficient to take the case out of the statute. Thus, putting the two distinct classes of cases upon the same footing, with this distinction, that in the one case it is put upon the rational ground, that the new items furnish evidence for the jury to presume an acknowledgment of the old, and in the other, all are assumed to be within the exception, because there are some items that have no need of its benefit.

The decision of the Court of King's Bench, in *Catling v. Skoulding*, is directly in the teeth of Lord *Northington*, when he says, in *Martin v. Heathcote*, that the statute *"*would be a bar as to all articles, before six years, in other accounts*" than merchants'; and in giving the opinion of the court, in that case, Lord *Kenyon* lays down the rule distinctly, that the plaintiff is not barred, though there has been no transaction of any kind between the parties for six years before the action brought, if the accounts were between merchant and merchant, &c.; and he assigns the reason, for then the case never was within the statute. It is also worthy of remark, that this opinion of Lord *Kenyon*, though it may be considered in some measure extrajudicial, was delivered in 1795, long after all the cases upon the subject, (except the case before Sir *Wm. Grant*, master of the rolls, 18 *Ves.*, and the case said to have been decided by Lord *Rosslyn*, in 1796,) and upon a review of the cases cited by the counsel, on both sides, which included all the cases upon the subject, except the equally extrajudicial opinion of Lord *Hardwicke*, in *Welford v. Liddell*, and that, too, in-

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consistent with his own doctrine fifteen years before, and the case of *Martin v. Heathcote*, decided by Lord Northington. And it is no slight impeachment of these two last cases, that they were not cited on that occasion.

The opinion of Lord Kenyon not only received the sanction of the other judges, upon due consideration, but is directly supported by *Jones, Cooke, and Berkely*, Justices, in *Sandys v. Blodwell*, (*Jones*, 401.) and by Lord Hardwicke himself, in the case referred to in *19 Vesey*, 180.

This doctrine is conceded in *Godfrey v. Saunders*, (3 *Wilson*, 94.) and directly sanctioned in *Stiles v. Donaldson*, (2 *Dallas*, 264.) where, though 17 years had elapsed since the date of the last item of the accounts, and no subsequent demand, the court were unanimously of opinion that the accounts were not within the act of limitations. That was a case of principal and factor.

This doctrine is shaken only, if at all, by the *dictum* of Lord Hardwicke, in *Welford v. Liddell*, by the case of *Martin v. Heathcote*, before Lord Northington, to which I have before referred; by the case of *Bridges v. Mitchell*, (*Gilb. Equ. Rep.* 224.) in which it is said, that, "if the account be by the plaintiff deserted, then it is barred," but otherwise the ground of decision does not very clearly appear; *(but, in another report of the same case, in *Bunbury*, 217, it is stated, that twenty-four years had elapsed after the transaction before suit brought; and if that be correct, it might well have been considered as deserted, and very properly rejected, as a stale demand, without any reference to the statute;) by the case of *Crawford v. Liddell*, probably confounded for *Welford v. Liddell*, as I can find no report of it; and by the case of *Barker v. Barker*, (18 *Vesey*, 286.)

This last case I do not consider of much weight, because it appears to have been decided upon a reference to *Welford v. Liddell*, and *Bridges v. Mitchell*, only; neither of which, in my opinion, bear out the master of the rolls in his decision.

The case of *Ramchander v. Hammond*, (2 *Johns. Rep.* 200.) in the Supreme Court of this state, was an action upon a promissory note; and to a plea of *non assumpsit infra sex annos*, the plaintiff replied, that the action concerned the trade of merchandise, between merchant and merchant. The defendant rejoined, and to this there was a demurrer and joinder. The court held the replication bad; and that decision may well be supported by the reasons assigned, that the exception "does not apply to an account stated;" that "it must be a direct concern of trade;" and that "liquidated demands or bills and notes which are only traced up to the trade of merchandise, are too remote to come within this description." This comes within the principle before stated, of a case, where, by the act of the parties, the cause of action has been removed and changed from an immediate concern of trade, and thereby put upon the footing of ordinary demands. It is true, the court, in deciding this case, indulge the language, that "the words" (of our statute) "are not so broad as to warrant a departure from the adjudications which have been made on the *English* act." But this remark was not called for by the necessity of that

case, and I think we are warranted in supposing that it was made without due consideration; for it would require a degree of flexibility, unusual to our courts of justice, and which would be to be deprecated, if it existed, to thread the crazy contradictions of those decisions; and the bare attempt to reconcile them, at once demonstrates the impracticability of the *undertaking, and shows that a departure from some of them is inevitable.

Should the question upon the construction of our statute, now be considered as one of the first impression, and taking its words as standing alone, without regard to the incongruous and contradictory decisions of the *English* courts, I apprehend it would be difficult to convince any man of sound understanding, that the statute was intended to have any operation upon *an action concerning the trade of merchandise, when it arises between merchant and merchant.*

And this construction is directly supported by the authority of the Supreme Court of the *United States*, in the case of *Mandeville & Jameson v. Wilson*, (5 *Cranch's Rep.* 15.) That was an action of assumpsit, brought in the Circuit Court of the district of *Columbia*, for goods sold and delivered, and for the hire of a slave. The defendants pleaded *non assumpserunt*, and the statute of limitations; and to the latter plea the plaintiff replied, that the money became due and payable on an account current of trade and merchandise between the plaintiff and defendants, as merchants, and wholly concerned the trade of merchandise. There was a rejoinder, surrejoinder, demurrer, and joinder, but the case turned upon the sufficiency of the replication. The court below gave judgment for the plaintiff; and, upon a writ of error, that judgment was affirmed. Ch. J. *Marshall*, in giving the opinion of the court, says, "that the exception in the statute applied to actions of assumpsit as well as to actions of account. That it extended to all accounts current which concern the trade of merchandise between merchant and merchant. That an account closed by the cessation of dealings between the parties, is not an account stated, and that it is not necessary that any of the items should come within five (a) years. That the replication was good, and not repugnant to the declaration, and that the rejoinder was bad." This decision was made on the statute *of *Virginia*, which, so far as relates to the present question, is precisely like the statute of *James*.

In the case under consideration, there has been no account stated between the parties, so as to vary or alter the character of the original transaction between them. The appellants did furnish an account, but some of its most prominent items were objected to at the time, and have not since been settled or agreed to. The mere act of furnishing an account does not make it a stated account, until it has the assent of both parties to its correctness. A different rule would put it in the power of one party, at any time, to impose upon the other a false account, and conclude him by it.

Lord *Hutchins*, in *Sherman v. Sherman*, (2 *Vern.* 276.) says,

(a) Five years is the period of limitation by the statute of *Virginia*, and this case arose under that statute.

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"Amongst merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it, in a second or third post;" thus plainly admitting the right to object. In the account furnished in this case, there is a charge for commission, which is one of the items objected to, and which, by the letter of the appellant, *James B. Murray*, to *George Dickinson*, the agent of the *Columbian Insurance Company*, dated July 7, 1813, was expressly stipulated not to be charged; "It being understood," says he, "that in case of sale being made by my house, no commission is to be charged for such sale."

The remaining branch of this subject, and in relation to which the most serious doubts pressed upon my mind, at the outset of the investigation, is, whether the *Columbian Insurance Company* could be considered a merchant within the meaning of the exception to the statute, so as to be entitled to the benefit of that exception.

Notwithstanding Justice *Atkins*, in *Farrington v. Lee*, (1 Mod. 270.) expresses an opinion, that "the makers of the statute had a greater regard to the persons of merchants, than the causes of action between them," I cannot but entertain a contrary sentiment. If it were, as Justice *Atkins* supposes, a benefit to the person, why was it not extended to all their transactions, as well to other actions as to those which concern the trade of merchandise? If it is to the person of the merchant, how long must he have been engaged in the business, *or what proportion of his capital, or his time, must be engrossed by it?

If that construction is correct, the words, "*which concern the trade of merchandise*," are entirely useless in that clause of the statute; but so far from that being correct, I apprehend they constitute the strength and marrow of the exception, and that the words, "*between merchant and merchant*," &c., are to be considered as being added for the purpose of confining the exception to concerns that are purely mercantile, and excluding others, such as transactions between a merchant and his customer. It is, then, the business of trade, and not the person engaged in it, that is entitled to the benefit of this exception; or, in other words, the person is entitled to it in respect to that business, and that only, for the encouragement of which the exception was inserted.

Thus the assignees of a bankrupt merchant would be as much entitled to the benefit of this exception, in relation to every concern of trade arising out of the affairs of the bankrupt, as the bankrupt himself. So would the representatives of a deceased merchant; and that, whether they had ever been engaged in trade themselves or not.

In the case under consideration, the *Columbian Insurance Company* had insured, for *S. & L. Clarkson & Co.*, a quantity of sugar on board the ship *Egeria*, on a voyage from *New-York* to *St. Petersburg* or *Archangel*. The voyage was broken up at *Copenhagen*, and the sugars, being abandoned to the insurers, as for a total loss, were received by the agent of the company, sold on their account, and the proceeds, either for the purpose of trade, or for the more convenient transmission of the amount to this country, were invested in linens, for which an account is sought by the bill

filed in this cause. No one would doubt, that in the hands of *S. & L. Clarkson & Co.*, this would have been purely a concern of trade; and as it is the business which gives character to the merchant, and not the merchant to the business, it can be no less a concern of trade in the hands of the *Columbian Insurance Company*.

Applying the principles before stated to these facts, it strikes my mind, and, indeed, is most satisfactory to my judgment, that, *pro hac vice*, at least, the *Columbian Insurance Company* must be considered as a merchant, within the meaning of the exception, whatever other business it may have pursued, or different concerns it may have been engaged in. In relation to this matter, it was, in my view, subject to all the duties, and entitled to all the privileges of merchants. The respondents, as assignees, became invested with all the rights and privileges of the company. The appellants may be considered in the light of factors to the company; and upon the best consideration I have been able to bestow, I have arrived at the conclusion, that this case directly and immediately concerns the trade of merchandise between merchant and merchant, and is, on that account, within the exception to the statute of limitations, and that, therefore, the plea was properly overruled.

I express this opinion under a conviction of the importance of the subject, but with no other distrust than what arises from a diffidence of my own ability to do it justice.

With the consequences of this doctrine, in a judicial capacity, we have nothing to do. It is sufficient for our present purpose, that such is the law; and if its policy has an evil tendency, which I cannot apprehend, it remains for legislative correction. I consider such of the *English* decisions as contravene the construction I have given to the statute, as little better than judicial usurpation of legislative authority.

On the second question that arises in this cause, which is, whether the claim of the respondents relates to the execution of a trust, so as, on that account, to be exempt from the operation of the statute, it would seem to be unnecessary to dwell, as the decision of either point in the case in favor of the respondents, is conclusive upon the merits of the appeal. But as this second point was chiefly relied upon in the argument, (and as it is by no means certain, that the other members of the court will agree with me in opinion as to the first,) I shall attempt a brief consideration of it.

To arrive at a correct decision upon this question, the relative situation of the parties is to be ascertained. From the facts disclosed in the bill, and which, for the purpose of the present discussion, must be taken to be true, so far as they are not *denied by the answers, it appears, that the appellants, and the *Columbian Insurance Company*, became jointly interested, in the purchase made by one of the appellants and the agent of the company, in thirty-five cases of linens, the former as owners of two thirds, and the latter of one third, which were shipped on the joint account of those concerned, from *Copenhagen* to *Gottenburgh*, and thence to the *United States*, where they were received and sold by the appellants, under whose direction they appear to have continued,

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after the shipment at *Copenhagen*. Were the parties partners in this adventure? Partners have a mutual and reciprocal control over the whole of the partnership property, and each may dispose, or make sale, of the whole; but will it be pretended, that the company, at any time, could have sold the appellants' interest in these linens? The appellants might, and did, lawfully sell the interest of the company, but it was because they were intrusted and authorized so to do. The letter of *James B. Murray*, written at *Copenhagen*, shows, that if not sold at *Gottenburgh*, the goods were to be shipped to this country, and one third of the proceeds of the sale to be received by the agent of the company, or one third of the goods delivered.

A community of interest, in profit and loss, was not in the contemplation of the parties at the time, for a severance of the property was then spoken of, as being in the option of the party, before the adventure should be at an end; and though there is a joint purchase, yet if each is to manage his share as he judges best, so that the profit or loss of the one may be more or less than that of the other, it is not a partnership. (*Coope and others v. Eyre and others*, 1 H. Black. 44.)

But these goods were received upon the express confidence, (I refer again to the letter of *James B. Murray*,) that they were to be sold at *Gottenburgh*, and the proceeds accounted for, and, if not sold at *Gottenburgh*, to be shipped to *America*, sold, and the proceeds accounted for, or the goods delivered to order, leaving it to the option of the company to put an end to the trust before sale; and, in my view of the matter, it is as clear a case of direct trust, as it is possible for the acts of the parties to make, and as much *so, as though a deed had been made for that purpose, and executed with the most solemn formality. The effect of such a deed, whether relating to real or personal property, could only be to transfer the property, with power to sell, and, if coupled with a power of revocation, before a sale should have taken place, would, in principle, present precisely the present case.

To such a case, it was conceded, on the argument, that the statute of limitations did not apply. But a distinction was attempted to be drawn between direct and implied trusts, to the latter of which, it was contended, this case belonged, if a case of trust at all, and to which, it was also contended, the statute did apply.

Courts of equity may, perhaps, have applied the statute, by analogy, to cases where, by construction of law, the party is placed in the situation of trustee, without his assent, for the sake of the remedy; that is, however, not the case here. The law assigns to the appellants no other situation than what was contemplated by the parties at the time of the transaction; and whether they are called factors, agents, or trustees, can, in my view, make little difference. A factor, though he have the right at law, is, in equity, but a trustee. (2 *Vernon*, 638.)

The case of *Lady Hollis* (2 *Vent.* 345.) is analogous to, though, perhaps, not so strong as the present. Her ladyship lent £100, and in the note given for it, it was stated, that it should be disposed of as she should direct. The court held it to be a *depositum*

or trust, and decreed payment, though, otherwise, it had been barred by the statute. IN ERROR.

In cases, too, more clearly of the character of trusts implied than the present, the statute has been held not to apply, as in *Heath v. Henly et al.*, (Ch. Cas. 20.) where the son and executor of Chief Justice *Heath*, who was made chief justice, at *Oxford*, during the difference between the king and parliament, but never sat at *Westminster Hall*, exhibited a bill against the defendants, who were prothonotaries of the King's Bench, for an account of the money received by them during the time of his being chief justice. The statute was pleaded, and the court, upon argument, held it to be a trust *virtute officii*, and overruled the plea.

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*So, also, in *Sheldon v. Weldman*, (2 Ch. Cases, 26.) where the son and executor filed a bill for an account of money received from the father, who gave it him to compound for his estate sequestered for delinquency at *Goldsmith's Hall*, the court declared it a trust, and therefore not within the statute.

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The claim on the part of the respondents, as presented to the consideration of the court, addresses itself to the moral sense, in a character of strong and prevailing equity. A technical defence is interposed. There may be facts and circumstances existing, which the nature of the defence does not disclose, and which justify the course to the conscience of an honest man. In judgment of charity, we are bound to suppose that there are; but, whether so or not it is a consideration which ought not to weigh upon the mind in the decision of this cause. The appellants are entitled to the benefit of their defence, if founded upon the principles that are known to govern a court of equity.

In no view, however, that the case has presented itself to my mind, and after the most careful investigation which I have been able to give it, does it appear to me, that the plea can be sustained. I am of opinion, therefore, that the order of the chancellor ought to be affirmed.

This being the opinion of the rest of the court,† (HOPKINS, Senator, dissenting,) it was, thereupon, "ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery, in this cause, be affirmed, and that the appeal be dismissed; and that the appellants pay to the respondents their costs in defending the appeal, to be taxed; and that the record be remitted to the Court of Chancery, to the end that this decree may be carried into execution."

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for affirming
25; for reversing 1.

Decree of affirmance.

Henry, for the appellants, inquired, whether the majority of the members were to be considered as concurring in the *opinion, delivered yesterday, by the chief justice, in this cause, and on the grounds stated by him, or in the opinion of Mr. Senator VIE-

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and a decree of affirmance pronounced, on a point which, though stated in the printed case before the court, was not much insisted on by the counsel on the one side, or objected to by the other, on the argument, the court refused, on application of the appellants, to modify the decree, so as to allow them to amend their answer, or file a supplemental answer, in the court below; especially, as it was to help the plea of the statute of limitations, and the answer, accompanying the plea, contained an admission of the debt. (a)

After a cause
has been argued
on appeal,

(a) Vid. *Murray v. Coster*, 4 Cow. Rep. 617.

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LIE; as, in the former case, he wished to make a motion to the court.

On taking the sense of the members of the court on this question, it appeared that all of them, except six, concurred with the *chief justice*, on the point, that the answer of the defendants contained such an acknowledgment and admission of the plaintiff's debt, as to defeat the operation of the statute of limitations, and that, therefore, the statute was no bar to the plaintiffs' claim.

Henry, and *R. Sedgwick*, for the appellants, then moved for a rehearing, or a modification of the decree, or that the cause might be sent back to the Court of Chancery, without prejudice, on the point on which the court had grounded their decision, so that the defendants might amend their answer, or file a supplemental answer, showing, that there was no such admission, or, if made, that it was confidential, and made between counsel, for the sake of peace, and during a negotiation for a compromise, and could not, therefore, prejudice their legal or equitable rights, when the compromise was rejected. They read several affidavits as to that fact. To show that the appellants had a right to amend, they cited *Coop. Equ. Pl.* 338. 6 *Vesey*, 587. 580. *Mitf. Pl.* 261. *Hind's Pr.* 416. *Beames's El. Pl.* 319, 320. 4 *Bro. P. C.* 640. 642. 4 *Johns. Ch. Rep.* 377.; and that even after hearing and a decree. (2 *P. Williams*, 427.) That this point, not having been argued or decided in the court below, could not now be decided upon here. (18 *Johns. Rep.* 558, 559, 560.) The offer being made by counsel, for the sake of peace, cannot be allowed to prejudice the rights of the appellants. (13 *Johns. Rep.* 288. *Peake's N. P. Cases*, 6. 2 *Camp. N. P. Cases*, 106. and note. *Bull. N. P.* 336. 1 *P. Wms.* 497.)

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Griffin, contra, said, that the case of *Beekman v. Frost* (18 *Johns. Rep.* 544. 558.) showed merely, that where a new point is taken, in this court, for reversing the decree, it will not be heard; it is otherwise, where the new ground is *taken in affirmance of the decree, and, more especially, where a new reason merely is assigned in support of the decision of the court below. That he did not, in his argument, enlarge on the *fourth* point, because he conceived, that the strength of the respondents' case did not rest upon it. One of the counsel (*Mr. Hoffman*) had, in his argument, referred to the negotiation between the counsel, but without suggesting that it was confidential. The whole of the negotiation is stated in the answer, and appears in the printed case. Was it not set forth in answer to the bill? If it was purely confidential, which he denied, the defendants were not bound to answer that part of the bill at all. Will an amendment, after a decree, be allowed, in order to let in the statute of limitations? Will a court of appeals permit such an amendment to be made? But, independent of the admission of the appellants, in the negotiation, they have made a sufficient acknowledgment of the existence of the debt. They state, in their answer, that, during the period of six years prior to the filing of the bill, they were never called on by

the respondents, or any person in their behalf, to pay or account for the proceeds of the linens, or any part thereof; but, on the contrary, they had no reason to suppose, that the respondents, or any other persons invested with the rights of the *Columbian Insurance Company*, would have accepted the proceeds of the said linens, or any part thereof; but that the appellants were given to suppose, and did suppose, that the respondents, acting in behalf of that company, intended to press against the appellants a claim for not proceeding in the voyage of the ship *Egeria*, on the ground that the same was unnecessarily broken up and relinquished in *Denmark*.

That in *January*, 1821, they were informed, that the respondents, as trustees of the *Columbian Insurance Company*, intended to prosecute them for damages, for not having duly prosecuted the voyage of the *Egeria*; and that, becoming alarmed by the threat of a prosecution, which might involve responsibilities to a great amount, &c., they set about preparing their defence, &c. And again, they say, that before the filing of the respondents' bill, they were applied to by one of the respondents, in behalf of the **Egeria* claim, but that he did not intimate any specific claim for the proceeds of the linens, &c.; and they referred him to their counsel, &c.; and that they instructed their counsel to offer to pay one third, &c.

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Henry, in reply, said, that as there was no replication filed, the whole answer must be taken to be true; and there was an express reservation of the plaintiffs' right to avail themselves of the statute, accompanying the offer of compromise. The plea of *non accrevit actio*, &c. at common law, contains as much an admission of the debt, as the answer of the appellants. Where a parol agreement is relied on, when the statute of frauds requires it to be in writing, if the defendant admits the parol agreement, in ever so broad terms, but says, at the same time, that he intends to protect himself against it, under the statute, the court will allow him to do so. Now, in the present case, the answer of the appellants contains a most explicit denial of any offer or admission; and avers, that if any such offer or admission was made, it was with the express declaration accompanying it, that they would rely on the statute of limitations for their defence. The court, then, ought to modify their decree, so that the appellants may not be prejudiced by a decision here on that ground.

SPENCER, Ch. J. The motion is to send back this cause to the Court of Chancery, with directions, to allow the appellants to amend their answer, so as to do away the effect of their counsel's admission of the debt. It is a novel application to a court of appeals. In the case of *Filkins v. Hill*, (4 Bro. P. C. 2 ed. 640.) in the House of Lords, certain issues were directed by the Court of Chancery to be tried at law, and which did not embrace the merits of the controversy, or the matters intended to be put at issue; and the House of Lords reversed that part of the decree, with liberty to the respondents to amend their bill, so as to put at issue the matters intended to be tried by the issues: and the ap-

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pellants were, also, allowed to put in a new answer to such amended bill. This direction of the Court of Appeals was proper, under the circumstances of that case. Here, *there is no allegation of any defect as to the matters at issue between the parties. The case of *Beekman v. Frost* is against rather than in favor of this application. What is there said about amendment, relates to the well-known practice of allowing the party to amend, where a demurrer is overruled, and is to be restricted to the cases cited. What relief the court below might have given the appellants, he would not say ; but, in this court, after argument, in which the point had been explicitly stated, and no objection then made, and after a decree had been pronounced, the case was widely different. But would this court, if it had the power, send back the case, in order that the appellants might amend their answer? Independent of all that relates to the negotiation between the counsel of the parties, alleged to have been confidential, the answer contains a sufficient admission of the debt to take it out of the operation of the statute. An amendment, therefore, of the answer, would avail nothing. If the court had the power, he should not be for exercising it, in order to let in the statute of limitations, in this case, where the party has made such a clear admission of the debt as is contained in the answer ; nor did he regard what passed between the counsel as coming within the privilege extended to proposals made merely for the sake of peace. He was of opinion, the motion ought to be denied.

PLATT, J., was absent.

WOODWORTH, J., said, that the application was certainly novel ; but he was satisfied that this court had the power to grant it, if a fit case was presented. That it was to let in the plea of the statute of limitations, ought not to excite prejudice against the party ; as that might be a very meritorious defence. The rule at common law, to refuse to set aside a default, to let in the plea of the statute has been exploded. If the court below, on the ground which has been taken, would have allowed the amendment, of which he had no doubt, the appellants ought not to be without remedy here. It is the genius of a court of equity to afford facility to arrive at the true merits and justice of the case. The chancellor decided the cause solely on the ground of the *appellants being trustees. The principle laid down in *Beekman v. Frost* (18 Johns. Rep. 544. 559.) appears to warrant this application. It is there said, that "if counsel shall, for the first time, raise a point here, which might have been obviated had it been raised in the court below, he ought not to be permitted to do so ;" and he took the rule to be equally applicable to an affirmance, as to a reversal of a decree.

Had the question been raised at the opening of the argument, this court would not have permitted the fourth point of the respondents to have been argued. It is true, that it was one of the points printed with the case, though he did not recollect that it was, at all, relied upon by the counsel for the respondents. If it was relied upon, and urged by them, and the appellants' counse-

waived their objection; they must be concluded by their silence. But he thought they had not waived their objection; and was of opinion, their present motion ought to be granted. He did not see in the answer any admission by the appellants of the debt, independent of what was said in the negotiation between the counsel of the parties.

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S. M. HOPKINS, Senator, said, that every plea of the statute of limitations virtually admitted, that the debt had never been paid. It was an admission of the debt on the record; as, by not traversing the declaration, which alleged the existing debt, but tendering an issue on a distinct matter, the whole of the allegations in the declaration were admitted. Every plea, therefore, of the statute of limitations, might, with equal propriety, be said to contain an admission of the debt, and to conclude the party from availing himself of the statute. Courts are not to suppose it their duty to get rid of the statute of limitations; it is often, as was observed by Lord *Mansfield*, a just and conscientious plea. We are not to inquire into the motives of persons who plead the statute; but are to presume that they are just and fair. The language of the answer that to avoid litigation the appellants proposed a compromise, showed that it was an offer of peace. It is impossible for a party to propose a compromise without an implied admission of the debt. All negotiations for amicable settlement between parties would *be cut off, unless protected by courts, so as to prevent the proposal from prejudicing the rights of the party making it. But, according to the decision of a majority of the court, as expressed the other day, that the answer contains a sufficient acknowledgment of the debt to take the case out of the operation of the statute, if the appellants were allowed to amend their answer, it could not do away that admission, which must stand by itself. Enough appears, however, to infer that there has been a misunderstanding between the counsel in the cause, as to this point; and he was, therefore, in favor of granting the motion.

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LIVINGSTON, Senator, said, this court, no doubt, would be confined to what took place in the cause in the court below; but how are we to know what points were argued in the Court of Chancery, except from the record? and we are to consider them, and such points as grow out of the pleadings and facts appearing on the record. The counsel for the appellants should not have suffered the proceedings to have been brought here, in the manner they have done, if they intended that any point arising out of those proceedings should not be relied upon or argued. He concurred in the opinion of the chief justice, that the motion ought to be denied.

SHEPHERD, Senator, said, he thought the motion ought to be granted.

VIELIE, Senator, said, that it was a novel application, to move the court to reverse its own decree. The Court of Chancery

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† For the mo-
tion 6; against
it 18.

ordered and decreed the plea and answer to be overruled; and that the defendants there put in a full and perfect answer to the bill, &c. A majority of this court has affirmed that decree. The appellants, therefore, will now gain all they ask for by this motion. They may incorporate in the answer which they are to put in, what they now ask for, if it can avail them; or, by an amendment of the plea, if the plea is directed to stand for an answer, obtain every purpose of the present motion. He was, for this reason, against granting the motion; otherwise, he should *have been in favor of a rehearing, if practicable, on the ground that the point on which the majority of the court rested their decision had not been argued here, nor in the court below.

The question being taken on the motion, a majority of the court† were against it.

Per Curiam. Motion denied.

NOTE.—Mr. *Griffin*, for the respondents, then offered a draught of a decree, stating the judgment of affirmance, as already mentioned; but adding thereto that the above motion was made and overruled, and also that the reason for the affirmance was, that the answer contained a sufficient acknowledgment of the debt, independent of the negotiation between the counsel. But the court did not adopt the decree offered, though no formal vote was taken upon it; and they directed that the usual order and decree be entered according to the judgment given on the 12th instant; and that the motion just decided was a subsequent and distinct proceeding, of which a distinct entry was to be made in the minutes of the court; and thereupon the following order was entered: "This court, having heard the arguments of the counsel of the respective parties, on the motion made by the appellants, founded on the affidavits in this cause, filed in this court, that the plea of the appellants be allowed to stand for an answer, with liberty to the respondents to except to the same, and with leave to the appellants to amend their answer in the court below, or to file a supplemental answer, do ORDER, ADJUDGE and DECREE, that the said motion be overruled and denied, with costs, to be taxed."

Nov. 15th.

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*GURDON S. MUMFORD, *appellant*,
against

FRANCIS H. NICOLL and WILLIAM VANDEWATER, *re-*
spondents.

Though the part owners of a ship are, generally speaking, tenants in common, yet there may be a special partnership between them,

APPEAL from the Court of Chancery. The respondents, on the 4th of *August*, 1817, filed their bill against the appellant. The bill stated, among other things, that in *December*, 1815, and before, the appellant and *Samuel Stilwell* were joint owners of the brig *Phoenix*, and her cargo, which was shipped in their joint names, and the vessel, with the cargo, was sent on a trading

voyage, from *New-York* to the *Mediterranean*. The vessel arrived at *Gibraltar*, where the master sold part of the cargo, and invested the proceeds in merchandise, with which, and such parts of the original cargo as remained unsold, he proceeded to *Messina*, where he disposed of the whole cargo, and invested the proceeds in wine, and oil, &c., with which he proceeded to the coast of *Brazil*, where this cargo was sold, and the proceeds invested in another cargo, with which he proceeded to the *Havana*, where he sold the whole of the last cargo, and the brig; and invested the proceeds arising from the sale of the vessel and cargo in sugar and coffee. *Stilwell* having become insolvent, the appellant, who had heard of the arrival of the *Phœnix* at *Havana*, wrote to the master, directing him to consign all the property purchased, with the proceeds of the sale of the brig and her cargo, to the appellant, individually. The master, accordingly, shipped the sugar and coffee so purchased, with the proceeds of the *Phœnix*, and her cargo, on board the brig *Newton*, of which he was master, and consigned the same to the appellant, individually, as if he was the sole owner. The *Newton* arrived at *New-York*, with her cargo so consigned to the appellant, on the 24th of *February*, 1817; *and by virtue of the bills of lading and invoices, the appellant entered the cargo at the custom-house, took possession of the whole of it, and sold it, as his own. The bill alleged, that *Stilwell*, as half owner of the brig *Phœnix*, and her cargo, was entitled to a full and equal share of the profits and proceeds of all the adventures, sales and investments aforesaid; and, being insolvent, S., on the 27th of *April*, 1816, made an assignment to the respondents, by deed, of all his stock in trade, debts, and property of every nature, in *trust*, to pay his *bona fide* creditors named in the assignment; and in the schedule annexed to the assignment, his share in the *Phœnix* and her cargo, &c. is mentioned as part of the property so assigned by him to the respondents. That at the time, or soon after the execution of the assignment, and long before the arrival of the *Newton* and her cargo at *New-York*, the appellant had notice of the assignment; and that the respondents claimed all the share of *Stilwell* in the *Newton's* cargo. That, relying on receiving the property so assigned to them, the respondents have paid S.'s debts to a large amount, and have also paid his custom-house bonds to the amount of 20,000 dollars, and upwards. That S.'s property, including his share in the *Newton's* cargo, assigned to the respondents, will be insufficient to pay the amount of the custom-house bonds; and the debts due to the creditors for whose benefit the assignment was made; and who, relying on that assignment, have, in pursuance of the stipulation contained in it, by an instrument under their hands and seals, discharged S. from his debts. That the respondents had demanded of the appellant the share of the *Newton's* cargo, belonging to S., which the appellant had refused to deliver, or to pay to them the proceeds thereof. The bill prayed for an account, &c., and that the appellant pay over to them the half of the proceeds of the *Newton's* cargo, &c.

The answer of the appellant admitted the facts stated in the bill

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in the ship, as well as in the cargo, in regard to a particular voyage, or adventure, and in the proceeds arising from the sale of them, and the profits of the voyage.

And where, in such a case, one of two owners, receives, or gets possession of, the whole proceeds, he has a right

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to retain them until he is paid or indemnified for what he has advanced or paid more than his share, for outfits, repairs, or expenses of the vessel for the particular voyage or adventure; but not for a general balance of account arising from former and distinct voyages or adventures in which they have been concerned together, in the same, or other vessels, there being no general partnership between them, and each adventure creating a special partnership, by itself, which terminated with the particular adventure. (a)

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relative to the joint adventure and voyage of the *Phœnix* and her cargo. He further stated, that he, and S., having been jointly concerned in other mercantile transactions and property, among others, in a ship called the *Union*, and a ship called the *Orris*, and in the schooner **Phœnix*, (afterwards altered to a brig,) and in voyages made by those vessels on their joint account. That S. being largely indebted to him, on account of those joint commercial transactions, and having become insolvent, and unable to pay what he owed to the appellant; and the appellant having no other means of indemnifying himself for the loss he had sustained by reason of his connection with S., wrote to the master of the brig *Phœnix*, informing him of the insolvency of S., and advising him to consign the cargo purchased at the *Havana*, with the proceeds of the *P.*, and her cargo, to the appellant; and that, in consequence of that information and advice, and also of merchants residing at H., the master, accordingly, assigned the cargo of sugar and coffee, as mentioned in the bill, to the appellant; and that he took possession of, and disposed of the same, and had appropriated the proceeds towards the payment of the debts due to him from *Stilwell*, as, he insisted, he had a right to do. He denied, that S. was entitled to any share of those proceeds, because, on a settlement of their partnership accounts, and after appropriating the whole proceeds of *Stilwell's* share in the cargo, towards paying what he owed to the appellant on such settlement, he would still remain indebted to the appellant more than 2,000 dollars. That the appellant, as joint owner of the *Phœnix*, had lately paid upwards of 1,600 dollars, to different persons, for work done to the brig, and other expenses, and for which the appellant had long before accounted with S., and paid to him his full proportion, being assured by S., that the whole had been paid by him; and that a suit was now pending in the Supreme Court, by the respondent, *Nicoll*, and his partners, against the appellant, for above 2,000 dollars, claimed for ship-chandlery furnished to the appellant and *Stilwell*; and for which the appellant had long since paid S., being informed by him that he had paid and settled for the whole.

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Proofs were taken in the cause; and the material parts of the testimony, as to facts not admitted in the pleadings, are sufficiently stated in the opinions delivered by the judges in this court. The cause having been heard in the court below, the chancellor pronounced a decree: *That M. and S. were owners, as tenants in common, in equal moieties of the brig *Phœnix*, and were special partners, having a joint interest in the cargo and voyage of the said brig; that the partnership, in the cargo and voyage, was one entire and distinct concern, unconnected with any former partnership, in any former voyage, in any other vessel or vessels; and it was thereupon referred to a master, to take and state an account between the respondents, as assignees of S. and M., in respect to the brig *Phœnix*, and her cargo and voyage, and that M. be charged with a moiety of the net proceeds of the brig sold at the *Havana*; and also with a moiety of the net proceeds of the freight and cargo of the brig, on the voyage mentioned in the pleadings, or so much, if any, of the net proceeds of the moiety of the freight and

cargo, as should appear to be due to the respondents, as assignees of S., after deducting the balance, if any, found due to M., from S., on an account to be taken and stated between them, in respect to such joint concern in the said freight, cargo and adventure, after all just allowances between them, in respect to such joint concern, are made; and that interest be allowed, &c.

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The CHANCELLOR assigned his reasons for this decree; for which see S. C. 4 Johns. Ch. Rep. 522—525. 530.

J. O. Hoffman, for the appellant, contended, 1. That, as the freight and cargo of the *Phœnix* were, undeniably, a *partnership* concern, the vessel itself must, under the circumstances of the case, be also considered as partnership property, and the accounts between the parties ought to be taken and stated on that principle. Why may not the contract and law of partnership apply to vessels as well as any other mercantile concern? No doubt, *prima facie*, owners of vessels are *tenants in common*. The cases cited by the chancellor, as to the maritime law on this subject, will not be disputed. But can there be no partnership in a warehouse, a stage coach, a livery stable, and the like? If things of that nature are, necessarily and essentially, connected with the partnership business, they cease to be property held by a tenancy in common, and become partnership *property. The vessel, in this case, was not hired, but was held by M. and S. as partners in business, and was to be sold in the same manner as the cargo. She was not let to freight; and it was the clear understanding of the parties, that she was a part of their stock in trade. The chancellor admits, that in *Doddington v. Hallet*, (1 Vesey, 497.) Lord Hardwicke expressly decided this question. "It must be admitted, the ship may be the subject of partnership as well as any thing else; the use and earnings thereof being proper subject of trade, and the letting a ship to freight as much a trade as any other." The foundation of the partnership stock is the ship itself, which must be employed, and the earnings and profits arise. Undoubtedly, all these persons subject to this agreement are liable, *in solido*, to the tradesmen who fitted it out; and this agreement for proportional shares, is as between themselves; which is the case of all partnerships; but as to all persons furnishing goods, or merchandise, or employed in work, each are liable *in solido*." (a) *In the case *Ex parte*

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(a) But see the notes and observations of Mr. Bell, in his "*Supplement to the Reports of Vesey, senior*," p. 205—209. 84. Mr. Bell gives the agreement between the parties in that case, *verbatim*, and observes, "It appears rather singular that Lord Hardwicke should have said so much as is reported, on the subject of the contractors being partners, since the agreement between them on the inceptive undertaking, negatives such a supposition as strongly as terms could make it, and since this very agreement is pressed by the defendant's counsel towards the top of p. 498." "This agreement is distinguishable from that of partnership, in which case each partner is liable *in solido*, on account of the transaction, the interest being joint. This is a covenant *severally*, not *jointly*; there being an express provision to prevent being accountable in any other way. It is a distinct, undivided interest; such tenants are in common, not liable *in solido*; and tenants in common of ships, are not to be put on the foot of a partnership trade, which is a fluctuating stock." Mr. Bell states, that "the doctrine reported in the above case, 'that part owners in a ship are partners, and liable *in solido*, for all goods furnished, and repairs done,' has been overruled on great consideration." And he refers to *Ex parte Young*, 2 Ves. and Bea. 242. *Ex parte Harrison*, in the Matter of Nicholson, 2 Rose's Cases in Bankruptcy, 76. and *Brent v. Hay*, (February 10, 1815,) "which governed many other cases waiting that determination." Montagu (on Partnership, vol. 1. p. 102. and see note (x) p. 88, 89.

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Young, (2 *Ves. & Beame*, 242.) the vessel had been let to freight and the bankrupts were managing owners. In all the cases, the distinction is observed between ships used for letting to freight, or otherwise. The case *Ex parte Parry*, (5 *Vesey*, 575.) appears to have no bearing on the present case. It is wholly immaterial, as regards insurance, whether it is a partnership or tenancy in common. Each partner or owner may separately insure. In *Smith v. De Silva*, (*Cowp.* 469.) Lord *Mansfield* decided on the principle laid down by Lord *Hardwicke*, whose decision must have been assented to, and acted upon, for half a century. In *Ex parte Christie*, (10 *Vesey*, jr. 105.) Lord *Eldon* said, "Unless it could be made out, that part owners of a ship are not partners, this was nothing more than a set-off of a separate debt against a joint debt;" (*Abbott on Ships*, 3d ed. 99.) and he adopts the principle we contend for, in refusing to allow the set-off in that case.

2. Again; although the appellant and *Stilwell* were not general partners, as to all their commercial concerns, yet they were carrying on, as partners, and at the same time, a number of adventures, in respect to the ships *Union* and *Orris*, and the brig *Phœnix*, and their respective cargoes, which formed, and so it was considered and treated between themselves, as one and the same partnership connection. The account, therefore, should have been directed to be taken between *Stilwell*, and the appellant, and between the respondents and the appellant, of the unsettled concern of the *Union*, *Orris* and *Phœnix*, and their respective cargoes and adventures.

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3. But we contend, that the appellant had a *lien* on the proceeds of the *Phœnix* and her cargo, in his hands, for the general balance of his account against *Stilwell*. Lord *Hardwicke*, in *Doddington v. Hallet*, held, that the plaintiffs had a specific lien on the share of *Hall*, for what they had paid, or were liable to pay to tradesmen, for building*and equipping the ship. And Mr. *Abbott*, (*on Ships*, 96, 97. 3d. ed.) in his remarks on the case, says, that the usage or course of trade was to charge the assignee or purchaser, in account, for the outfit, and other expenses incurred, in respect of the voyage of which he is entitled, in consequence of his purchase, to share the profits. The assignment by *Stilwell* is not for the benefit of *all* his creditors, as the chancellor appears to suppose, but for certain creditors, named in the assignment, to whom he gives a preference, most unjustly, as regards the appellant.

Henry, contra. This court have decided, that an insolvent debtor may lawfully prefer one creditor to another. (*Murray v. Riggs*, 15 *Johns. Rep.* 571.) The court are bound to give effect to the assignment in the present case, as much as if it had been

of notes) cites the case of *Ex parte Gibson, in re Peacock*, (4th of November, 1808,) as deciding that a bankrupt's interest in a moiety of a vessel, is the *separate* property of the bankrupt; and is not to be held by the assignees for the purpose of paying the joint creditors of the ship.

Mr. *Watson*, in his *Treatise on the Law of Partnership*, (p. 139. 142. 2d ed. 1807,) adopts the doctrine of Lord *Hardwicke* without any hesitation or comment, as the settled law. And he ranks these joint adventures by part owners of ships, as special partnerships, in which they have all the rights, and are subject to all the liabilities of partners; but the relation of copartnership ceases with the particular adventure, and at no time extends to any of their other concerns. (p. 54, 55.)

made for all the creditors generally. There is no pretence, that it was fraudulent. The respondents, as assignees of *Stilwell*, have a legal preference, and they have, at least, equal equity with the appellant, even on the foot of the *lien* claimed by him. The appellant had notice of this assignment before the property was consigned to him. Is not, then, the equity with the respondents? Notwithstanding the opinion of Lord *Hardwicke*, in *Doddington v. Hallet*, every one must perceive great force and solidity in the brief argument of the defendants' counsel, as reported in that case. The appellant was bound to show, affirmatively, that the vessel was converted into partnership stock. There was no freight received, for the plain reason that the vessel was the property of the owners of the cargo. It is admitted, that Lord *Hardwicke* went the full length of allowing the partnership lien. But the cases of *Ex parte Young*, *Ex parte Harison*, *Ex parte Gibson*, *Ex parte Parry*, and *Ex parte Browne*, (6 *Vesey*, 136.) and the opinions of Mr. *Abbott* and Mr. *Belt*, all stand opposed to the decision of Lord *Hardwicke*, and which must be now regarded as expressly overruled by Lord *Eldon*.

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The *lien* of the appellant, if it could exist at all, remained no longer than to the time when the *Phænix* was sold, and converted into money. Whenever the subject of the *lien* is parted with, the *lien* is gone. It is said, that the appellant, *having the rightful and lawful possession of these proceeds, has a specific *lien* on them for the general balance of his account. We answer, that the conduct of the appellant, in causing the proceeds of the *Phænix*, and her cargo, to be shipped to him individually, for the purpose of obtaining possession of the whole, was inequitable and unjust. The possession was acquired wrongfully. A person who gets possession of a thing by misrepresentation, will not be allowed to retain it on the ground of a *lien*, to which he might otherwise have been entitled. (*Madden v. Kempster*, 1 *Camp. N. P.* 12.) So, if a person claims and obtains the possession of goods, wrongfully, on paying freight and expenses, he cannot retain them, until he is indemnified for what he has paid. (*Lempriere v. Pasley*, 2 *Term Rep.* 485.) The possession, then, acquired by the appellant, after notice of the assignment of *Stilwell's* share, can never bar the equity of the respondents.

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T. A. Emmet, in reply, contended, 1. That, independent of any partnership, a part owner of a vessel has a right to be paid for all his advances for outfits and expenses, over and above his share.

2. That where a vessel and cargo are jointly owned, in one common adventure, it is an exception to the general law, as to vessels, and both vessel and cargo are partnership property.

3. Where the whole subject matter is thrown into one common fund, all the creditors must take subject to the general account of the partnership.

The case of *Doddington v. Hallet*, was a most solemn decision of Lord *Hardwicke*, and is acknowledged to be so by Lord *Eldon*, as appeared from a manuscript note in his possession. (2 *Ves. & Beame*, 243, 244.) Lord *Hardwicke* limited his decision, in that

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case, to a point which has never been overruled ; namely, the liability of the vessel for the outfits and expenses. On the contrary, this equitable principle of Lord *H.* has been since uniformly adopted. Mr. *Abbott*, so far from denying it, lays down the law in conformity to the doctrine. In commenting on the case of *Smith v. De Silva*, (*Abbott on Ships*, 94. 3d ed.) he says, "It is true, indeed, *that as long as the ship continues to be employed by the same persons, no one of them can be entitled to partake of the profits, until all that is due, in respect to the part he holds in the ship, has been discharged." The decisions, subsequent to that of *Doddington v. Hallet*, may be said to limit the application of that case, to outfits and expenses, but the case does not appear to have gone beyond that ; and there seems, therefore, to be no reason for doubting its correctness. The appellant does not wish to disturb the settled distinction between partnership property, and the property of tenants in common. There can be no doubt, that ships may become partnership property ; and the evidence in the case shows, that the *Phoenix* was joint or partnership property. Lord *Eldon* himself marks the distinction between joint owners and part owners. If the vessel was not considered as partnership property, it would be in the power of each owner to defeat their joint business.

Again ; the appellant and *Stilwell*, being jointly concerned in the *Union* and the *Orris*, as well as the *Phoenix*, the whole was one connected partnership concern, as between them, in regard to these different adventures.

PLATT, J. It appears, that on the 27th of *December*, 1815, *Mumford*, and one *Samuel Stilwell*, were joint owners, in equal proportions, of the brig *Phoenix*, whereof *James Green* was master : that *Mumford* and *Stilwell*, as limited partners for that adventure, planned a voyage, and shipped a cargo at *New-York*, on board the brig, in their joint names, with instructions to the master to proceed to *Gibraltar*, and there to sell the cargo, in whole or part ; to invest the proceeds in another cargo, and from thence to carry on a trading voyage, as the master might think proper, for the benefit of the owners : that the vessel and cargo, accordingly, proceeded to *Gibraltar* ; thence to *Messina* ; thence to the coast of *Brazil* ; (at each of which places, the cargo was exchanged of in whole or in part ;) and from thence to *Havana* ; where the captain sold the whole of the cargo, which he had brought there. On the 27th of *April*, 1816, *Stilwell*, being insolvent, made an assignment to the respondents, in trust for his creditors, of all his share in that vessel and *cargo, and all his estate of every kind and nature whatever, of which assignment his late partner (*Mumford*) had notice, in a few days thereafter.

On the 13th of *September*, 1816, (four and a half months after the assignment,) *Mumford* wrote to Captain *Green*, then at *Havana*, informing him of the failure of *Stilwell*, and requesting *Green* to sell the brig *Phoenix* there, and to invest the proceeds of the vessel, and former cargoes, in a new cargo at *Havana* ; and to ship such new cargo, consigned to him (*Mumford*) alone, at *New-*

York. Captain *Green*, accordingly, complied with that request, and shipped the whole avails of the vessel, and of his former cargoes, in a new cargo of sugar and coffee, consigned to *Mumford*, at *New-York*; which was received by *Mumford*, accordingly, on the 24th of *February*, 1817.

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The respondents then, by virtue of the assignment, demanded *Stilwell's* half of the return cargo, so received by *Mumford*, which *Mumford* refused, on the ground, that *Stilwell* owed him a large balance on partnership account, in relation to that voyage; and, also, in relation to other trading voyages, in which they had been jointly concerned; claiming, that, upon a full settlement of all their accounts, *Stilwell* would be largely indebted to him, and insisting on his right to retain the whole of the return cargo, as the means of his indemnity.

The only question was, on what principle *Mumford* ought to account to the assignees of *Stilwell*. The chancellor decreed, that the partnership extended to the cargo, and not to the brig *Phœnix*: that, in regard to the vessel, *Mumford* and *Stilwell* were tenants in common, and not partners; and that *Mumford* should therefore account to the assignees, and be charged for one half the net proceeds of the vessel; and for such balance, if any, as should appear to be due to *Stilwell* on a settlement of the partnership concerns, in relation to the freight and cargo, "after all just allowances between them, in respect to such joint concern, are made." The chancellor excluded from the account to be taken, all claim for balances, if any, due to *Mumford*, on account of former trading voyages, in which it appears there had been limited partnerships between them of a like kind.

*I am of opinion, that the decree is right. The vessel was owned by them as tenants in common, beyond all question, before the voyage was planned. It is important to remark, that before the shipment at *New-York*, *Mumford* purchased of *Stilwell* one sixth of the vessel, so as to make their shares equal, and no entry appears of it in the partnership account; which, I think, denotes, that although they were partners in the adventure of the cargo, yet the vessel was not considered or treated as partnership property; and, according to my judgment, upon the evidence, the brig was not sent abroad to be sold. The instructions to Captain *Green*, to make sales, extended to the cargo only; and the sale of the vessel was in consequence of the private directions of *Mumford* alone, after he had notice of the assignment of *Stilwell's* share. The bill states, that *Stilwell* and *Mumford* were equally interested in the vessel and cargo: "that the cargo was shipped in their joint names, and the captain signed bills of lading for it, as the property of both; and that the cargo was to be taken to *Gibraltar*, and there sold, if a market should offer; and, if not, the vessel and cargo, or such parts of it as might not be then sold, and the investment of the proceeds of what might be sold, were to proceed to such other ports or places as, in the opinion of the master of the vessel, might be most advantageous for the joint owners; and that the master was to carry on a trading voyage with the vessel and

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cargo, in such way as he might think best, and most for the advantage of joint owners of the vessel and cargo."

The answer admits, "that the destination of the vessel, and the powers and instructions of captain, and the purposes of the voyage, were such, as in the bill are set forth."

Captain *Greene* (in his answer to the third cross interrogatory) testifies, "that the owners of the brig *Phœnix* agreed to allow him commissions upon the sale and purchase of cargoes." But he nowhere pretends or intimates that he was to be allowed commissions on the sale of the vessel, or that he had any instructions from the joint owners for the sale of the vessel. The sale of the vessel was not because she was *unseaworthy*, nor because she was not *wanted for the completion of the voyage. The captain purchased another vessel at *Havana*, in lieu of the *Phœnix*, for the very purpose of bringing home the return cargo. The sale of the *Phœnix* was never contemplated until after Mr. *Mumford* was informed of the assignment made by *Stilwell*. Then, for the first time, instructions were given to sell the vessel. Before that private letter of *Mumford*, the understanding undoubtedly was, that the captain was to bring home the return cargo in the same vessel in which he carried the outward cargo; and the only object in changing the vessel seems to have been to commit the whole to the exclusive possession and control of *Mumford*; which he probably was advised could not be done, if the brig *Phœnix* came to *New-York*.

If the assignment had not been made, the *Phœnix* would have returned to *New-York*, and then the owners would have stood in the same relation as they originally did; that is, as *tenants in common*. It would not have entered the mind of either of them, that the vessel was subject to a *partnership lien*, after the joint adventure of the cargo had ended. Upon this sale of the entire vessel, by one of the tenants in common, the assignees of the other tenant in common had an option, to affirm the sale of their half or not. They might have pursued the vessel, and maintained their right to a moiety of her; but were not obliged to do so. They have elected to affirm the sale; and have therefore a right to hold *Mumford* accountable for the net proceeds of that sale. Such election was perfectly consistent with their rights as tenants in common, and by no means subjected them to a settlement and liquidation of accounts, on principles of partnership. *Mumford* certainly could not gain such an advantage, by his own wrongful act.

A ship may undoubtedly be a subject of partnership, as an *instrument* of commerce, and also as an article for sale. But here the parties were joint owners previous to, and independent of their limited partnership in the cargo and trading voyage. The vessel *happening* to belong to the shippers in this case, was the mere *vehicle* of their merchandise, and was no otherwise connected with the partnership adventure than if it had been chartered from other ship-owners. *It was properly likened, by the chancellor, to a store-house of which the partners were tenants in common.

But it is said, the decree is erroneous, in denying to *Mumford* an allowance for repairs on the vessel, preparatory to the voyage.

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If the decree be so, I consider it wrong ; because, as between ship-owners, who are mere *tenants in common*, each has a *specific lien* for repairs. (*Abbott*, 96. (116.) 93. (113.) by *Story*.) I am persuaded, however, from the terms of the decretal order, that the chancellor did not mean to exclude the charge for repairs. If the amount of credit to be given for repairs was exactly equal to half of the net proceeds of the vessel, it would make no difference whether the account was taken on the principle of a tenancy in common, or of a partnership ; but the proof may show a great disparity. If the parties were *tenants in common* in the vessel, as I think they were, then *Mumford* is to be charged with one half of the net proceeds of the brig *Phœnix*, after deducting such proportion of the amount expended by him in repairs on that vessel, as shall be equal to the proportion which *Stilwell* owned in her, at the time of the repairs. If they were *partners* in the vessel, as well as the cargo, then *Mumford* is to be credited for *Stilwell's* proportion of the repairs put on the vessel by *Mumford*, and the whole proceeds of the vessel and cargo are to be accounted for on the principles of partnership ; that is, he is to pay over to the assignees of *Stilwell* half the surplus, if any, after satisfying the just claims for debts, expenses, and advances, in the character of *partner*.

It does not appear that the claim for repairs, made by *Mumford*, on the vessel, of which he was joint owner, was ever distinctly presented to the mind of the chancellor ; and he has no where, in his opinion, discussed that point, nor even adverted to it. This omission is, to my mind, conclusive evidence that he was never called on to decide that point ; and that it was considered a matter of ulterior discussion. The only question before him, in regard to the vessel, was, whether the account between the parties should be taken on the principles of partnership, or of a tenancy in common. It is the settled doctrine of this court, that no point can be regarded as a proper subject of *appeal*, *which has not been expressly litigated in the court below. The decretal order is, that the account shall be taken on the footing that the parties were *tenants in common*, and not *partners* in the vessel, with the explanatory remark, “*after all just allowances between them in respect to such joint concern are made.*” This was a general direction to the master ; and the question of repairs will arise, when “*all just allowances*” shall be considered. The proceeding was *interlocutory* merely ; and every item of the master's report, when it comes in, will form a subject of exception before the chancellor. As yet, he has expressed no opinion on that point.

I am also clearly of opinion, that the chancellor was right in deciding that the account is not to be taken *subject to the unsettled balance* (if any) due to the appellant, on former joint trading voyages in the ships *Union* and *Orris*. There is no evidence of a general partnership. *Mumford* and *Stilwell* each did business, as a merchant, on his own account, and those joint voyages were occasional adventures merely, and independent of their ordinary commercial business.

My opinion, therefore, is, that the decretal order of the chancellor ought to be *affirmed*.

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WOODWORTH, J. The appellant, and *Samuel Stilwell*, as appears by the pleadings and proofs, although not general partners, had been concerned as partners in voyages made by certain ships, called the *Union* and the *Orris*, and the shipments made in those vessels, on their joint account; they also were owners of the vessels. It does not appear when this joint concern commenced, but it does appear that it was still in existence, and not brought to a close, on the 16th of *January*, 1816; for, on that day, an account was exhibited by *Stilwell*, and settled by the appellant, in which various charges in relation to that concern are contained; all of which are dated in 1815. In the account (exhibit H.) of the assignees of *Stilwell* against the appellant, there is a charge, *November* 17, 1815, for one half of a premium paid for insurance of the ship *Union* from *Gibraltar* to *New-York*; and under date of *February* 27, 1816, the *assignees make various charges against the appellant for articles received by the ships *Union* and *Orris*.

By the appellant's account (exhibit S.) it appears, that on the 19th of *April*, 1816, the appellant purchased of *Stilwell* one half of the ship *Orris*; and that on the 28th of *May*, 1816, one half of the ship *Union* was purchased at auction by the appellant. This account was seen by *Vandewater*, one of the respondents; and he was satisfied with the correctness of it. It is proved by several witnesses, that the appellant and *Stilwell* were jointly concerned in those vessels, and their cargoes and voyages. From the preceding statement, it is evident that this partnership in the vessels and cargoes continued, and had not terminated, when, in *December*, 1815, the appellant and *Stilwell* commenced another joint concern in the *Phoenix*, out of which has arisen the present controversy. This does not appear to be a case where the several owners or tenants in common let the vessel on charter party, or had in view the mere earnings or profits arising from freight; but where they contemplated a trading voyage, in which both were equally concerned. One principal object connected with that voyage was, that both vessel and cargo should be sold, and new investments be made for the benefit of the concern. This fact does not seem to be a point in dispute; the question, then, is, admitting that the owners of a vessel are to be regarded on the nice distinction of a tenancy in common, whether, by the act of the parties, the vessel was not made, in respect to this concern, as much a part and parcel of the partnership property as the cargo which she contained. If it was, it may not be material to decide on the question, whether a part owner of a vessel, when there is no partnership, general or special, can assign his share without reference to any equitable lien on the vessel. No proposition seems to be better settled, than that where there is a partnership, the partner in advance has a lien on the partnership property for any balance that may be due to him on the partnership account. The law will not permit a separate creditor to receive more than the partner is entitled to, in whose place he stands; he can only claim the share of his debtor after the other partner is satisfied, and *after all just debts, expenses and advances are allowed. This is the settled rule in relation to partnership property. (1 *Vesey*, 239. *Couper*, 438

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145. 4 *Vesey*, 396. 17 *Vesey*, 193.) In the application of the rule, there is not a uniform current of authority. In *Doddington v. Hallet*, (1 *Vesey*, 497.) the facts were these: *Hall*, the defendant's intestate, entered into an agreement with the plaintiffs, by which he was authorized to contract for the building of a ship for them for the service of the *East India Company*, and for the fitting out, manning, and victualling her. *Hall* dying intestate, the part owners filed a bill against his representatives, that they might have a specific lien upon what should be due to *Hall* for his share, for the money the plaintiffs had paid to the tradesmen, in fitting out the ship, and that the plaintiffs had a lien on the partnership estate, in respect of the balance that should come out due to him on the partnership account. Lord *Hardwicke* determined the broad question, "that the ship may be the subject of partnership as well as any thing else; the use and earnings thereof being a proper subject of trade, and the letting a ship to freight, as much a trade as any other; that it was a partnership among the parties, and the ship was a part of the subject thereof, it being their method of trading." The general doctrine seemed not to be contested. Lord *Hardwicke* observed "that the defendant's counsel had been forced to resort to the case of an assignment of a share for valuable consideration, which was not then before the court, and must be governed by the course of trade; that if it stood on general equity, he was of opinion, that if a purchaser have notice of the partnership, he would be subject to it. If he had not notice, it would be a strong case for the purchaser, because he would have gained the legal interest; but if, by the course of trade, it is otherwise, that will prevail, and is to govern mercantile matters."

The doctrine, then, is, that the ship is to be considered as partnership property, and liable for equitable liens, even against a purchaser for valuable consideration with notice, and, perhaps, without notice, if so was the course of trade. The case before the court is not that of a purchaser for valuable consideration, but where the assignees stand in the place of *Stilwell*, and have the same equity as if he had been a party; consequently, if this rule be correct, it is decisive on this point. The justice of applying it to a case where there is no purchaser for valuable consideration without notice, seems to be founded on the purest equity, for it requires no more than that the ship be chargeable with all debts, for which either owner was liable on account of the ship. I do not perceive any difficulty in applying this equitable lien, although the ship be considered as standing upon the distinction of a tenancy in common. *Abbott (on Ships, 103.)* observes, "The several part owners of a ship are tenants in common with each other of their respective shares; each has a distinct, although undivided interest in the whole, and upon the death of any one, his share goes to his own personal representatives, and does not accrue to the others by survivorship." Be it so; it is perfectly consistent with the claim in equity, that, as between the several owners, the distinct individual share shall be holden until all debts on account of the ship are discharged; this is the substance of the rule laid down by Lord *Hardwicke*. I have not discovered that this case

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has been overruled or controverted, until the case *Ex parte Young*, (2 *Ves. & Beames*, 242.) It is true, Lord *Eldon* adopted a different rule, and held that the bankrupt's share passed to his creditors, there being no lien in favor of other partners, in respect of their disbursement and liabilities. The succeeding *English* cases have followed the last rule, and are considered, at present, as settling the law on this question in that country. It may, I think, be fairly presumed, that the rule laid down by Lord *Hardwicke* had been acquiesced in, if it cannot be shown to have been drawn in question for more than half a century. How can it be safely said, that this case has never been acted upon during so long a period? The community may have considered the rule settled, and applied it to cases that may have arisen. That such cases must have been frequent, in a country so highly commercial as *England*, cannot well be doubted; that the rule should not have been assailed for such a length of time, is strong evidence that the principle on which it was founded, had the sanction of justice and law. So far, then, we may conclude *that it has been acted on. That it has not been recognized by any subsequent decision in an analogous case, will be admitted; it remained, however, an authority, until overruled in the late cases. Were it indispensable now to decide between these conflicting opinions, I should be disposed to subscribe to the opinion of Lord *Hardwicke*, as laid down in *Doddington v. Hallet*.

But the appellant is not driven to the necessity of supporting Lord *Hardwicke*, for the question here may be determined on principles that will not be disputed. It was admitted, on the argument, and cannot well be denied, that if the appellant and *Stilwell* had been general partners in trade, the doctrine would be sound. In this case, if the owners of the ship, by agreement or arrangement, have made it a part of the partnership property, with which they were conducting their operations, a lien necessarily arises to make it liable for partnership debts and advances. It is true, the appellant and *Stilwell* were tenants in common, and part owners of the ship; and if no further connection appeared, the question would be very different from the one which arises in this case. It is admitted, that here the parties were partners in the cargo and voyage; is it not equally clear, they were so in the vessel? It is not the case of a vessel being chartered or earning freight, *eo nomine*; but the vessel is to be sold, as well as the cargo; the avails of both are to be invested in such manner as the master may consider most advantageous. This has been carried into effect; the ship and outward bound cargo were sold, and equally applied in procuring a return cargo, and in carrying on the trade; they were both inseparably connected with this object. Such was the original intention, which was steadily kept in view, and terminated in the shipment of the goods by the brig *Newton*, which came to the appellant's hands.

After all this, to say that, in respect to the ship, the appellant and *Stilwell* stand as tenants in common, and part owners merely, and that the ship formed no part of the partnership property, is to my mind a proposition not founded in fact. If I am correct in this

conclusion, it follows, on acknowledged principles, not depending on the authority *of *Doddington v. Hallet*, that the ship, equally with the cargo, is liable for all debts for which either owner is chargeable on account of the ship.

The next question is, whether the proceeds of the brig *Phoenix* and cargo, or either of them, are subject to any balance that may be due to the appellant in respect to the ships *Union* and *Orris*, and the voyages by those vessels on their joint account. The answer to this question will depend on the nature and extent of the connection or partnership that existed between the appellant and *Stilwell*. It is not pretended they were general partners in trade, nor is it necessary they should be, in order to give the appellant the right now claimed; but it is necessary to show, that the connection, or partnership, that existed in the *Union* and *Orris*, continued, and included the concern in the cargo and voyage of the *Phoenix*: in short, that the several voyages and adventures, taken together, formed a continued partnership transaction.

The partnership between the appellant and *Stilwell* was limited; it is not pretended that it extended beyond the vessels and cargoes just mentioned. The partnership business was to be carried on in this channel. From this source, the profits, if any, were to be derived. No specific agreement, as to the nature and extent of the partnership, is made out in proof; what they were, must be collected from the acts of the parties. We find them engaged jointly in vessels, cargoes, and trading voyages, and in no other business. When they commenced does not appear; but it was some time before the *Phoenix* was sent out, that the appellant and *Stilwell* had been concerned jointly in the vessels, cargoes, voyages and adventures of the ships *Union* and *Orris*. That concern was not closed when the *Phoenix* sailed, as appears by the exhibits in the case; indeed, the ships were not sold until after that period. Now, I admit, that if the facts before us show satisfactorily, that the appellant and *Stilwell* intended that three special or limited partnerships should exist, that is to say, one in respect to each vessel and voyage, then clearly the appellant cannot hold the avails of the *Phoenix* and cargo, to apply them in discharge of any balance that may be due to him, arising out of the concern in either of the *other vessels. But is there evidence that any such thing was contemplated? I have not been able to discover it. We find the appellant and *Stilwell* commencing and carrying on business, in three different vessels, at different times; but it was a continued business, and did not close until *Stilwell* made an assignment of his property. These facts prove one transaction; the business in each vessel was the same; the objects the parties had in view were the same; the concern in the *Union* and *Orris* was not closed; their interests were blended, and extended equally to the three vessels. Such facts will not allow me, against the intrinsic evidence in the case, to say that the appellant and *Stilwell* ever contemplated that the concern in each vessel should form a distinct partnership transaction. For this they could have no motive or inducement; the profits would depend on winding up the whole concern, not the successful termination of a particular voyage; and

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can it be imagined, that either party intended to put it in the power or control of the other, to withdraw, or assign, or transfer, the avails of one voyage, which were necessary to make up the losses, or to discharge the claims that existed in relation to another? It seems to me they must have intended directly the reverse. I consider these parties as commencing the business of a limited partnership in vessels, cargoes and trading voyages. After having sent out one vessel and cargo, they proceed to a second, and then to a third. To say that each vessel and cargo is to be considered as being the subject of a distinct and separate partnership, rather than parts and parcels of the same transaction, does not appear to me warranted by the evidence. The appellant cannot be compelled to part with the avails of the *Phœnix* and cargo, until an account shall be taken between him and the assignees of *Stilwell*, in respect to the several vessels, voyages and cargoes; inasmuch as they formed but one partnership concern, and, consequently, the appellant has a lien on the partnership property in his hands, to satisfy the balance that may be found due to him in respect to the unsettled concerns of the *Union*, the *Orris*, and the *Phœnix*, including the moneys which the appellant has been compelled to pay *to certain creditors, after having advanced and allowed the same previously to *Stilwell*.

I am, therefore, of opinion, that the decree of his honor the chancellor be reversed: and that a decree be entered corresponding with the principles I have stated.

SPENCER, Ch. J. The questions in this case are, 1. Whether the appellant had such a lien on the proceeds of the sale of the brig *Phœnix*, as to be entitled to hold those proceeds, subject to the settlement of the account between him and *Stilwell*, for the payments made by the appellant, on account of that voyage, and the charges in relation to the vessel and her outfit, against the respondents' claim, as assignees of *Stilwell*.

2. Whether the appellant is, in like manner, entitled to hold the proceeds of the sale of the *Phœnix*, to satisfy any balance which may be due him from *Stilwell* upon the unsettled concerns of the *Union* and the *Orris*.

The decree appealed from, considers the appellant and *Stilwell* to have been owners as tenants in common, in equal moieties, of the brig *Phœnix*, and that they were special partners, and had a joint interest in the cargo and voyage; and that that partnership was one entire and distinct concern, unconnected with any former partnership, in any former voyage, in any other vessel; and it was decreed, that a master should state an account between the respondents, as assignees of *Stilwell*, and the appellant, in respect to the brig *Phœnix*, and her cargo and voyage, and that the appellant be charged with a moiety of the net proceeds of the brig sold at *Iurana*, and with a moiety of the net proceeds of the freight and cargo of the brig on the voyage, or so much, if any, of the net proceeds of the moiety of the freight and cargo as shall appear due to the respondents, as such assignees, after deducting the balance, if any, found due to the appellant from *Stilwell*, on an account to

be taken and stated between them, in respect to their joint concern in the said freight, and cargo, and adventure, after all just allowances between them, in respect to such joint concern, are made. In other words, the decree considers the appellant and *Stilwell* as joint owners and partners, in regard to *the cargo and freight, and directs the amount to be stated on that principle, confining that, however, to the particular voyage and concern of the brig *Phoenix*; and it considers them tenants in common of the vessel itself, and renders the appellant liable for the net proceeds of the sale of the brig, denying to the appellant a right to reimburse himself out of those proceeds, however the accounts between the appellant and *Stilwell* may stand, either as regards that voyage, or other concerns and voyages in other vessels.

I put out of consideration, at once, the inquiry whether the appellant knew of the assignment to the respondents, of *Stilwell's* interest in the brig, when he requested Captain *Green* to consign to him the proceeds of the brig and cargo, because there is no complaint of the sale of the brig, which was made in pursuance of instructions originally given, and which never were revoked; and because the appellant's right depends on legal principles, and not upon the circumstance that he has those proceeds in his possession. The question simply is, Has he a right to hold them subject to the inquiry into the general balance of his account, either in relation to that particular adventure, or in relation to other and similar adventures? In short, under the facts and circumstances of this case, are the proceeds of the vessel to be regarded as partnership property, either as regards the voyage of the *Phoenix*, or other and similar voyages in other vessels?

I understand the chancellor as admitting, that the case of *Doddington v. Hallet* (1 *Ves. senr.* 497.) is directly opposed to the decision he has made, and that he considers that case as not only not having been acted upon, but as overruled by the cases to which he has referred. We will see what Lord *Hardwicke* decided in that case. The bill was founded on an agreement between the plaintiffs and one *Hall*, authorizing the latter to contract for the building of a ship, and for fitting out, managing and victualing her, with an agreement to pay proportional shares, according to their interests. The part owners claimed, against *H. W.'s* representatives, a specific lien, upon what was due to *Hall* for his share, on account of the money the plaintiffs had paid to the tradesmen, in fitting, &c. the ship, and that the administrators should not run away with it as part of the general *assets for all the creditors. Lord *Hardwicke*, after premising that the case stood as though *Hall* himself was before the court, no one having a specific lien on *Hall's* share in the ship, went on to say, that it must be admitted, that a ship might be a subject of partnership as well as any thing else, the use and earnings thereof being a proper subject of trade. He said, it was a partnership among them, and the ship itself to be part of the subject thereof, which was to be let to freight to the company, it being their method of trading; the foundation of this partnership stock was the ship itself, which must be employed, and the earnings and profits to arise. That, un-

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doubtedly, all the persons subject to the agreement are liable *in solido*, to the tradesmen who fitted it out, and the agreement for the proportional shares is as between themselves, which is the case of all partnerships. He said, if it had been agreed that a brew-house should be part of the partnership stock, (which often happened,) the case of the brew-house being used in the partnership trade, if workmen do work in the brew-house, every partner would be liable to that, and that brew-house must be brought into the partnership account; and if more was due to one partner than another, all the share of the partnership stock, consisting of the lease of the brew-house, as well as the other effects, are liable to that account. He went on to observe, that if the share of one partner had been assigned, if it stood on the head of general equity, he should be of opinion, that if the purchaser had notice of the partnership, he would be subject to it; and he decreed for the plaintiffs.

Lord *Hardwicke* perfectly understood the distinction between a tenancy in common, such as owners of different shares in a ship have among themselves, and a joint tenancy, as between partners of the goods and stock in trade. He meant to decide, and did decide, that a subject which ordinarily may be held as a tenancy in common, may, by the acts of the parties, become to be held in joint tenancy. And the facts of the agreement to build the ship at their joint expense, in proportion to their shares, and the agreement to fit her out, manage and victual her, for the service of the *East India Company*, formed, in his judgment, such a *community of interest, as to constitute that a partnership transaction, in relation to those subjects, and thus a specific lien was acquired by those who contributed more than their shares, against the share of the one who contributed less than his proportion.

This case derives strong confirmation from the case of *Smith v. De Silva and others*, (*Corp.* 469.) in which it was decided, upon an issue out of chancery, that the interest of part owners in a ship and in the profits and loss of an adventure, undertaken by their mutual consent, is not affected by the bankruptcy of one of them taking place after the commencement of the voyage, although he has not paid his full share of the outfit. Lord *Mansfield*, in giving the opinion of the court, held, that if the other partners had been obliged to discharge the amount of the notes, which remained unpaid at the time of the bankruptcy, the assignees must have allowed the other partners, the full sum paid for the bankrupt, and would have come against them only for the balance due to him, if any. Mr. *Abbott*, in commenting upon this case, says, it seems to have been considered, that part owners of a ship might have a lien on each other's shares of a ship, as partners in trade have on each other's shares of their merchandise. And in the third edition of his *Treatise*, p. 94, he says, "It is true, indeed, that as long as the ship continues to be employed by the same persons, no one of them can be entitled to partake of the profits, until all that is due, in respect to the part he holds in the ship, has been discharged." And again, after citing the case of *Doddington v. Hallet*, without a word of disapprobation, in p. 96, he says, "This usage, or course

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of trade, I apprehend to be, to charge the assignee or purchaser in account for the outfit, and other expenses incurred, in respect of the voyage of which he is entitled, in consequence of his purchase, to share the profits, which can only be the voyage in prosecution at the time of the purchase ; but not to carry back the charge, as against him, to the expense of any antecedent adventure, from which he can derive no profit."

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The cases cited by the chancellor, and on which he has relied, to establish a contrary doctrine, do, undoubtedly, strongly impugn the authority of *Doddington v. Hallet*, *though I must be allowed to say, that the case *Ex parte Parry* (5 *Vesey*, jr. 575.) is very distinguishable, and does not oppose Lord *Hardwicke's* opinion. It is, however, to be observed, that all the cases on which the decree is founded are long since our revolution, and have no authoritative influence here ; and I am not disposed to overrule Lord *Hardwicke*, supported, as I think he is, by Lord *Mansfield*, and the other judges who sat with him, in a case, in which justice and right require him to be supported. The statement of this case shows, that it is much stronger for the appellant than the case before Lord *Hardwicke*. The vessel here was owned in equal shares, and was fitted out, or to be fitted out, on a circuitous trading voyage, at the joint expense of the parties. It was, therefore, a limited and special partnership, not only as to the cargo, freight, and the profits thereon, but as to the fitting out of the vessel. The appellant, after paying his proportion of mechanics' bills and shipchandlery, under the assurance they had been paid by *Stilwell*, is called upon, and compelled to pay them over again. The respondents are assignees for prior debts, and are chargeable with notice, or, at all events, have received the subject, liable to all equities between the appellant and *Stilwell*. Can it be just and equitable to deprive the appellant of his right to reimburse himself for the moneys he has been compelled to pay, as part owner, for the default of *Stilwell*, in whose shoes the respondents stand? I answer, unhesitatingly, that it would be inequitable and unjust to do so.

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I must not be supposed to overrule the distinction between partners in goods and merchandise, and part owners of a ship. The former are joint tenants, and the latter are, generally speaking, tenants in common ; and one cannot sell the share of the other. But I mean to say, that part owners of a ship may, under the facts and circumstances of this case, become partners as regards the proceeds of the ship ; and if they are to be so regarded, the right of one to retain the proceeds, until he is paid what he has advanced beyond his proportion, is unquestionable.

I have no idea that, in taking the account, any reference is to be had to other adventures in other vessels, which the *appellant and *Stilwell* may have carried on. No general partnership existed between them, and each adventure created a partnership by itself, which terminated with the particular adventure. I do not mean to speak definitely of the other voyages, but I wish to be understood as saying, that, in this case, the accounts of the *Union* and *Orris* are not to be taken into consideration. My conclusion is, that the decree appealed from be reversed, with directions, that in the ref-

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erence to the master, he shall be directed to allow the appellant such sums of money, out of the proceeds of the sale of the *Phœnix*, as he may have paid more than his proportion for the repairs done to the *Phœnix*, in fitting her for the voyage mentioned in the pleadings; and also such sums as the appellant may have paid more than his proportion in the outfit of the vessel, in shipchandlery, stores, &c.

AUSTIN, LEFFERTS and MILES, Senators, concurred in the opinion of Mr. Justice PLATT.

SHEPHERD, Senator, concurred with Mr. Justice WOODWORTH.

† Nov. 13th.
For affirming
4; for reversing 24.

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A majority of the senators† concurred in the opinion of Mr. Chief Justice SPENCER, that the decree of the chancellor ought to be reversed in part, and modified; and it was thereupon “ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery be reversed; and that it be referred to one of the masters of the said court to take and state an account, and make report thereon between the respondents, as assignees of *Samuel Stihwell*, and the appellant, in respect to the brig *Phœnix*, and her cargo and voyages, and the net proceeds thereof, on the footing of a special partnership in such brig, cargo and voyage, and the proceeds thereof; and that on such account, the master make all just allowances for any moneys the appellant may have paid more than his proportion for repairs to the *Phœnix*, in fitting her for the voyage mentioned in the pleadings in the Court of Chancery, and also for any moneys the appellant may have paid more than his proportion in the outfit of the said vessel, in shipchandlery or otherwise, *excluding from such accounts any former or other partnership, in any former or other voyage, in any other vessel or vessels. That the question of costs in the Court of Chancery, and all other questions, be reserved until the coming in of such report; and that the record and proceedings be remitted to that court, to the end that this decree may be carried into execution.”

Decree accordingly.

JONATHAN J. CODDINGTON, and JOSEPH C. CODDINGTON,
who were impleaded in the Court below with JOHN F.
RANDOLPH, and JOSIAH SAVAGE, *appellants*,
against
THOMAS BAY, *respondent*.

A person receiving negotiable paper, in the usual course of trade, for a fair and valuable consideration, from an agent or factor, having no au-

APPEAL from the Court of Chancery. The bill, filed June 15, 1819, by the respondent against the appellants, stated, that in April, 1819, being the owner of a vessel called the *Express*, he employed R. & S., who were merchants and copartners in trade, in New-York, to sell her, on a credit, and instructed them to take good approved notes in payment, and to transmit them forthwith to him, with an account of their charges, which should be imme-

diately paid, with which instructions *R. & S.* engaged to comply. That *R. & S.* sold the vessel for 3,875 dollars, and on the 3d of *June*, 1819, received from the purchaser, six promissory notes, dated *May* 5, 1819, at two, four and six months, payable to *R. & S.*, or order, which they refused to deliver to the respondent. That *R. & S.* became insolvent, and delivered the notes to the appellants, *J. J. & J. C. Coddington*, who were under large advances and responsibilities for **R. & S.* The bill charged, that the appellants, when they received the notes of *R. & S.*, knew that they had been given in payment for the vessel belonging to the respondent, which had been sold for his account by *R. & S.* The bill prayed, that the appellants might be decreed to deliver up, and account to the respondent for the notes. The answer admitted that *R. & S.* had stopped payment when they delivered the notes to the appellants, who admitted, that when they received the notes, *R. & S.* were not actually indebted to them, otherwise than that they were under large gratuitous responsibilities for *R. & S.*, as endorsers of notes for their accommodation, payable at different times, but subsequent to the 12th of *June*, 1819, and which they were, afterwards, obliged to take up as they fell due. The appellants denied all knowledge of the manner in which the notes had come to the hands of *R. & S.*, and they alleged, that they believed them, at the time, to be the exclusive and *bona fide* property of *R. & S.*, and received them, with others, to indemnify them, as far as they would avail, for their responsibilities. That three days after the notes were delivered to them, they disposed of some of them for cash; and did not know, until several days afterwards, that they belonged to the respondent, as stated in his bill. *R. & S.*, in their answer, say, that when they received the notes of the purchasers of the vessel, they gave their guaranty against any demands existing against the vessel previous to the sale, and paid her bills in *New-York*, amounting to 48 dollars and 14 cents, and that their commissions on the sale amounted to 96 dollars and 87 cents, and that they had received no counter security for their guaranty. Replications were filed to the answers, but no proofs were taken in the cause, which was brought to a hearing on the pleadings; and on the 8th of *January*, 1821, the chancellor decreed, that the appellants were not entitled to the notes, or the proceeds thereof, as against the respondent, who was the lawful owner of them when they were transferred to the appellants; inasmuch as they did not receive the notes in the course of business, nor in payment, in whole, or in part, of any then existing debt, nor for cash, or property advanced, or debt created, or responsibility incurred on the credit of the notes; *and he directed a reference to a master to compute the amount of the notes, with interest; and that the appellants, and *R. & S.*, or some, or one of them, pay to the respondent the sum that should be reported as the amount of the notes and interest, in thirty days after the report was filed, and notice thereof, &c.; and that *R. & S.* pay to the respondent his entire costs of suit, to be taxed, and that he

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for them, but without knowledge of that fact, or notice of the fraud, may hold them against the true owner.

But where *R.*, as agent, had received notes, to be remitted to his principal, and passed them to the defendant, as security against responsibilities assumed by him, as endorser of the notes of *R.*, and the maker of notes lent *R.* for his accommodation, but not then payable, and the defendant had no notice or knowledge that the notes belonged to the plaintiff, but believed that they belonged to *R.*, who had become insolvent at the time he received them: *Held*, that the notes not being received in the usual course of trade, nor for a present consideration, the defendant was not entitled to hold them against the true owner. (a)

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(a) *Colt v. Lesnier*, 9 Cow. Rep. 320. *Warner v. Beardsley*, 8 Wendell's Rep. 194. *Bristol v. Sprague*, id. 423.

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give credit upon those costs for the charges and commissions due from him to *R. & S.*, on the sale of the vessel, and that the respondent have execution for the balance; but that no costs be allowed to the respondent, or the appellants, *J. J. & J. C. Coddington*, as against each other. From this decree an appeal was entered to this court.

The CHANCELLOR assigned his reasons for the decree; for which, see *S. C. 5 Johns. Ch. Rep. 54—56—59.*

Van Buren, for the appellants, contended, 1. That the notes being negotiable, and in possession of *R. & S.* as the lawful holders of them, they had a right to negotiate and pass them away, for a valuable consideration. That a *bona fide* holder of a negotiable note, without notice, is entitled to it, is too well settled to be denied; but it will be attempted, on the part of the respondent, to except the present case from the operation of the general principle. The first case on the subject, is the one decided by Lord *Holt*, (1 *Salk.* 126. *Anon.*) who held, that trover would lie against the finder of a bank bill, payable to bearer, but not against his assignee, who, by the course of trade, acquires a property in it. In *Miller v. Race*, (1 *Burr.* 452.) it was decided, that a bank note, though stolen, became the property of one who gives a valuable consideration for it, without notice of the fact of its being stolen. The same principle is laid down in *Grant v. Vaughan*, (3 *Burr.* 1516.) So, in *Peacock v. Rhodes*, (*Doug.* 633.) where a bill of exchange, with a blank endorsement, had been stolen, and was passed to a shopkeeper, in payment for cloth, without notice, Lord *Mansfield* held, that the innocent holder was entitled to recover against the drawer. He said, "that the holder of a bill of exchange, or promissory note, is not to be considered *in the light of an assignee of the payee." "The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties." "I see no difference between a note endorsed blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases." In *Collins v. Martin*, (1 *Bos. & Pull.* 648.) Chief Justice *Eyre* said, "For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder, with the bills, takes the property, and his title is stamped on the bills themselves. The property and the possession are inseparable. This was necessary to render them negotiable; and, in this respect, they differ essentially from goods, of which the property and possession may be in different persons. The property passing with the possession, it is admitted, that a banker, who receives endorsed bills from his customer, to be got when due, and carried to his account, may discount or sell them; why may he not pledge them? Either is a breach of confidence reposed in him, and he may sell, because the property has been intrusted to him; and he may pledge for the same reason; for he who has the property has a disposing power, and the law has not limited it to be used in any particular manner." (1 *Bos. & Pull.* 539. 4 *Camp. N. P. Rep.* 349. 2 *Camp. N. P. Rep.* 123. 1 *Sch. & Lefr.* 345, 346. 448

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3 *Atk.* 232 13 *East's Rep.* 130. 135. 1 *Camp. N. P. Rep.* 557. 4 *Esp. N. P. Rep.* 56. 1 *Ld. Raym.* 713.) In *Putnam v. Sullivan*, (4 *Mass. Rep.* 45.) the rule has been laid as strongly in favor of the holder as in any of the *English* cases. But the chancellor rests his decree on two grounds; 1. That the notes were not received by the appellants, in the course of trade; and, 2. That they gave no consideration for them. It is perfectly immaterial, whether the appellants received them in the course of trade or not. The true question is, whether it is necessary for them to show, that they paid a new and distinct consideration for the notes. The only inquiry is, whether the appellants came by the notes honestly, and *bona fide*. No matter what the transaction may have been between the holder and the person from whom he obtained the notes, so long as they *were received *bona fide*, and for a valuable consideration. In *Clarke v. Shee*, (*Cowp.* 197. 200.) Lord *Mansfield* says, "Where money or notes are paid *bona fide*, and upon a valuable consideration, they never shall be brought back to the true owner." In *Conroy v. Warden*, (3 *Johns. Cases*, 259. 268.) Mr. Chief Justice *Thompson* says, "I take it to be well settled, that with respect to bills of exchange, and promissory notes, they, in this respect, stand on the same footing with specialties, and *prima facie*, import a consideration." In *Putnam v. Sullivan*, the manner in which the note had been negotiated was not made a subject of inquiry. The course of trade is to be understood, in the broad and extensive sense of commercial policy, in regard to negotiable paper; and is not confined to a single instance of dealing. (2 *Johns. Ch. Rep.* 442. 444.)

2. We contend, that the notes were passed to the appellants, for a valuable consideration. They, however, were *bona fide* possessors of the notes, independent of the question, whether they paid a new and distinct consideration for them, at the time of the transfer. But is not an indemnity against responsibilities, a good and legal consideration? (2 *Johns. Ch. Rep.* 306. 4 *Johns. Ch. Rep.* 329.) It is a mistake to suppose that the responsibilities of the appellants were *contingent* when they received the notes. The appellants had lent their own notes to *R. & S.*, to the amount of 10,000 dollars. They did not stand as mere endorsers. Their responsibility for their own notes was absolute. Besides, before they were informed of the respondent's claim, some of the notes endorsed by them had become due. In *Ex parte Bloxham*, (8 *Vesey*, 531, 532.) the acceptance of bills was held to be a good consideration. There is no essential difference between taking a note for an antecedent, or for a newly-contracted debt, as regards the question of consideration. The question comes to this: Who, of two honest men, shall be the sufferer by the dishonesty of a third person? The appellants and respondent are equally honest. The tree must lie as it has fallen. The money is in the possession of the appellants, and cannot be taken away from them, without showing fraud, or *mala fides*.

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**S. Jones*, contra, said, he was surprised at the assertion, that the appellants and respondent were equally innocent. The

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facts of the case showed that the appellants had acted fraudulently. The cases of *Scott v. Surman*, (*Willes's Rep.* 400.) and of *Taylor v. Plumer*, (3 *Maule & Selw.* 562.) show how far courts will go in order to recover back notes passed away by a factor or trustee. Bills or notes in the hands of a banker or factor, who becomes bankrupt, do not pass to his assignees, but belong to his principal. (9 *East*, 12. 3 *Camp. N. P. Rep.* 301. 5 *Vesey*, 169. 12 *Vesey*, 119.) Is it true, that a person can pass negotiable paper, in all cases, and in all respects, as his own property? Must he not apply it to its proper office, by obtaining a credit on the note itself? This is what is meant by "the course of trade." There must be a new contract, or credit given, at the time, to the note. In the present case, the appellants made no engagement or contract on the faith of these notes; nor were the notes passed to them in payment of any debt then existing. All the numerous cases cited show the rule to be as we state it. (1 *Bas. & Pull.* 648. 1 *Moore's Rep.* 543. 2 *Dallas*, 296.) Will the appellants sustain any loss by returning to the respondent these notes? Their rights against *R. & S.* remain the same. They cannot be wronged by doing what is right towards the respondent. They ought not to pay their own debts with his property. The appellants received the notes after they knew that *R. & S.* were insolvent. A party who comes into possession of a forged note cannot recover the money on it. *Ex parte Bloxham* was a bankrupt case, and the assignees stand in the place of the bankrupt. In all the cases it will be found, that some new credit has been obtained on the notes which have been passed. In *Buller v. Harrison*, (*Cowp.* 565.) Lord *Mansfield* says, "Shall a man, though innocent, gain by a mistake, or be in a better situation than if the mistake had not happened? In this case there was no new credit, no acceptance of new bills, no fresh goods bought, or money advanced." "Is it conscientious, that the defendant should keep money which he has got by the misrepresentation of his principal, and should say, Though there is no alteration in my account with my principal, this is a hit; I *have got the money, and I will keep it." The most injurious and pernicious consequences would flow from the doctrine contended for by the other side.

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T. A. Emmet, in reply, said, that though the conduct of *R. & S.* may have been fraudulent, yet the appellants, *J. J. & J. C. C.* having acted honestly, may fairly retain the notes. The legal title is in them; they could support an action against the makers, at law. The question, Who has the greatest equity? does not apply in this case. Who trusted most? The respondent might have limited the power of his agents, and have prevented their negotiating the notes. The appellants did not trust *R. & S.* when they took the notes, as payment or security. It is true, that this is a hard case on the respondent. There is hardship also in the case of the appellants; but the case must be decided by the general rules of law, not on considerations of any particular hardship. The great object and policy of the law is to make the circulation of negotiable paper as nearly as possible the same as

money. It is not a question about goods, but money; and it is on the analogy to *cash*, that the principle as to negotiable paper stands. The true and only inquiry is whether the holder came fairly and honestly by the paper. The principle is not to be limited and narrowed by the fact of his advancing money for the notes, or by his taking them in the course of trade, as it is called. These are *matters of evidence* to go to a jury, as to the *bona fides* of the transaction. The title of a *bona fide* holder is derived from the paper itself, not from the person from whom he receives it. The holder is not (as Lord *Mansfield* said) to be considered as an *assignee*. In the case of a bankrupt, his assignees stand in his place. So, executors and administrators stand in the place of the deceased. Whether the notes were received for a valuable consideration, or in the course of trade, would make two rules, instead of one; but neither of them is the rule. They only afford *evidence* in support of the true rule, the *bona fides* of the holder. It would be more correct to say, the note must be received in the course of business, or in honest dealing, &c. The question, to test the application of the principle, should always be, Could the party, under the same circumstances, hold money? If he could, he may, for the same reason, hold negotiable paper. If this doctrine is well founded, it follows, that receiving the notes as an *indemnity* for responsibilities, is a good consideration, and sufficient to establish the *bona fides* of the transaction, on the part of the holder.

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WOODWORTH, J. *Randolph & Savage* were the agents of the respondent, and, as such, held certain promissory notes belonging to him, which they, on the 12th of June, 1819, fraudulently, and without authority, passed to the appellants. It is stated, in the answer, that at the time the notes were received by the appellants, *Randolph & Savage* were not, in a strict legal sense, indebted to them in any amount whatever; but that the appellants were under engagements and responsibilities for them, having endorsed certain notes for R. & S., and lent them their own notes to a large amount, none of which had then fallen due. That the appellants received the notes in question as a guaranty and indemnity against the responsibilities they were under, (all of which were then contingent,) and without notice of any interest, right or title of the respondents.

The prayer of the bill is, that the notes so received be delivered to the respondent, or the amount paid to him.

This brief statement presents a case of hardship, let the loss fall as it may, inasmuch as no fraud is imputable to either of the parties concerned in this appeal. The question is one of strict law, in the decision of which, the community at large, and more especially the commercial part, have a deep interest. Any fluctuation in the law relating to bills of exchange and promissory notes, would be a serious evil, and necessarily affect the circulation of this species of paper: distrust, and want of confidence, would embarrass mercantile operations, unless the rule to be applied be stable and uniform. With this view, I have carefully examined the cases cited on the argument. The general rule laid down

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seems to be this, that where negotiable paper is transferred for a valuable consideration, and without notice of any fraud, the right of the holder shall prevail against *the true owner; all the cases substantially agree in this. In the application of the rule, this question arises, What is that *valuable consideration* intended, which shall protect the holder as against the drawer of the note? Is the rule satisfied, if enough is shown to make out a consideration, as between the holder and the agent, who assigned or transferred the paper? If nothing more is required, the appellants must prevail; for the notes were passed for the indemnity of the appellants, and, so far as *Randolph & Savage* are concerned, that formed a valid consideration. The right to hold against the owner, in any case, is an exception to the general rule of law; it is founded on principles of commercial policy. The reason of such a rule would seem to be, that the innocent holder, having incurred loss by giving credit to the paper, and having paid a fair equivalent, is entitled to protection. But what superior equity has the holder, who made no advances, nor incurred any responsibility on the credit of the paper he received, whose situation will be improved, if he is allowed to retain, but, if not, is in the condition he was before the paper was passed? To allow such a state of facts as sufficient to resist the title of the real owner, would be productive of manifest injustice, and is not required by any rule of policy; it is enough if the holder be secure when he advances his funds, or makes himself liable on the credit of the paper he receives. In coincidence with this principle, it appears to me, all the cases have been decided; for, although the rule is laid down generally, that the holder will be protected where the bill or note is taken in the usual course of trade, and for a fair and valuable consideration without notice, in every case I have met with, where the owner failed to recover, it appeared that the holder gave credit to the paper, received it in the way of business, and gave money or property in exchange. In *Miller v. Race*, (1 Burr. Rep. 452.) it is stated, that the mail was robbed, a bank note taken out, and afterwards passed to the plaintiff, an inn-keeper, who took it *bona fide, in his business, for a valuable consideration*, and without notice; it was held, that the plaintiff was entitled to the note. In *Grant v. Vaughan*, (3 Burr. Rep. 1526.) the plaintiff took a bill of exchange that had been lost, and paid the value *of it; it was held that he was entitled to the bill. Mr. Justice *Wilmot*, in that case, observes, "Though both the claimants were innocent, yet, as *Grant* took the note in the course of trade, *bona fide*, and upon a valuable consideration, *Grant* has the better equity." Upon what is this better equity founded? Because *Grant* parted with his property *for the bill*, and was an innocent holder. In *Peacock v. Rhodes*, (Doug. Rep. 633.) it was held, that an innocent endorsee might recover on a bill of exchange with a blank endorsement, which had been stolen and negotiated; but it appeared, that the person who transferred the bill, bought cloth and other articles in the way of the plaintiff's trade, as a mercer, and received the value. Lord *Mansfield* says, "The jury have found that the bill was received in the course of trade, and, therefore, the case is

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clear, and within the principle of all the cases, from that of *Miller v. Race*, downwards." So, also, in the case of *Collins v. Martin*, (1 *Bos. & Pull.* 648.) it was held, that if *A.* deposit bills endorsed in blank with *B.*, his banker, to be received when due, and the latter raises money on them, by placing them with *C.*, and, afterwards, becomes bankrupt, *A.* cannot maintain trover against *C.* for the bills. In that case, as in all the preceding, the holder paid value for the bill; an advance was made in money; had that not been made out, it is evident to my mind that the holder would not have been protected. Chief Justice *Eyre*, in giving the opinion of the court, observes, "If the holder gave no value for the bill, he would be affected by every thing which would affect the first holder." What is meant by giving value for the bill, must be collected from the whole case of which he is speaking. The holder, in that case, advanced his money on the credit of the bill. The language of the court cannot be mistaken: something must have been paid in money or property, or some existing debt satisfied thereby, or some new responsibility incurred in consequence of the transfer; this would be paying value, and making out a good consideration within the reason and meaning of the rule. In such a case, the holder of a bill of exchange or promissory note, is not to be considered in the light of an assignee of the payee, and bound to take the thing assigned, subject to *all the equity to which the original party was subject; but he stands on the ground of an innocent purchaser of negotiable paper, who, having parted with his property, is entitled to the benefit resulting from his purchase, in opposition to the right owner. So, also, in *Lawson v. Weston*, (4 *Esp. N. P. Rep.* 56.) where a lost bill had been discounted, the plaintiff recovered. Lord *Kenyon* considered the point settled by the case of *Miller v. Race*, and observed, "If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, they could not recover." The general rule is to be understood as applicable to cases of this description; there does not seem to be any necessity to go further. The credit of bills and notes cannot be impaired, or their circulation impeded, if the right of the holder is limited and restricted in this manner. He still retains all the rights that the law intended to confer on him, or that commercial policy can reasonably require. To deny the relief prayed for by the respondent, would introduce a new rule, not warranted by any of the adjudged cases.

Every man who takes negotiable paper, is supposed to know, that he does not acquire an indefeasible right. A note given for money won at play, or upon a usurious consideration, may be inquired into in the hands of an innocent endorsee. Does this obstruct the circulation of bills or notes? So every holder knows, or is presumed to know, that the title of the right owner cannot be divested, unless value has been given, or liability incurred. The rule, then, as I conceive, is well established, and must govern the present case. The question is, whether the appellants are within its provisions. *Randolph and Savage* had stopped payment, and were insolvent, which was known to the appellants at the time they re-

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ceived the notes. They were not *then* indebted to the appellants, for none of the notes were due; the liability of the appellants was still contingent, although it is admitted there was good reason to believe it would soon become absolute. No responsibility was incurred in consequence of taking the notes; they were received as an indemnity; the situation of *Randolph and Savage* was desperate, and no doubt the appellants were anxious to get hold *of any thing that had the semblance of security. If the notes became effectual in their hands, then so much was gained; if not, they remained in *statu quo*. The mere probability that the notes would be valid in their hands, was inducement enough to seize on them with avidity; it might be the means of rescuing something from the shipwreck. Very different is the case of a holder for value paid; he makes the advance on the credit of the paper; if that fails, his loss is certain. But it has been urged, that if the appellants had not reposed themselves on the rule now contended for, they might have obtained other security, and, consequently, they are prejudiced by the decree. This argument cannot be listened to; it only proves that the appellants may sustain an injury in consequence of mistake as to the rule of law. With this the court has no concern. The true question is, Have they paid value for the notes, or made any new engagements as the consideration of the transfer? This is not pretended. I am, therefore, of opinion, that the decree of his honor the chancellor ought to be affirmed.

PLATT, J., concurred.

SPENCER, Ch. J. The facts in this case must be perfectly within the recollection of the court. The respondent, being the owner of a schooner, employed *Randolph and Savage* to sell her. They made a sale, under an authorization from the respondent, and took negotiable notes, payable to themselves, from the purchasers, for 3,875 dollars, the consideration of the sale. Before the respondent could get possession of these notes, *Randolph and Savage* became entirely insolvent, and assigned to the appellants, without any request or solicitation on their part, the notes in question, with other debts, to secure the appellants for certain endorsements and responsibilities they were under for them; there being no other indebtedness on the part of *Randolph and Savage* to the appellants, nor had they then paid, or been called upon to discharge, any of their collateral liabilities. It stands conceded, that no new credit was given by the appellants to *Randolph and Savage*, in consequence of *the delivery to them of the notes in question; nor was there any other consideration paid or given for the notes, except the antecedent responsibilities which the appellants had entered into for them. The appellants allege, that when the notes were received and assigned, they did not know, nor had they any intimation, that the notes had been received by *Randolph and Savage*, in payment of the purchase-money of the schooner, nor did they know any thing on that subject.

The question, then, between the parties, is brought to this single point: Which of them has the best title to the notes; the respond-

ent, on whose account and for whose benefit they were taken, in consequence of the sale of his property; or the appellants, who received them from the ostensible owners as security for responsibilities, which had before been incurred, but who did not give any new consideration for them, nor part with any security, as an inducement to their being delivered?

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The chancellor has examined several of the cases, in which it has been decided, that bank notes, bills of exchange, and navy bills, having been passed by a *mala fide* holder or in a *mala fide* manner, might be held by the persons to whom they have been passed, when they were received in the regular course of trade, for a consideration advanced at the time, and were taken *bona fide*, and without any knowledge of the fraud, or want of title in the person passing them. All the cases cited by the chancellor, and those cited by the appellants' counsel, have been decided on the ground, that the notes or bills were taken in the usual course of trade, and for a present consideration paid; not one of the cases is like the present, where notes or bills thus passed, were received in security of an antecedent debt.

We are, then, called upon to establish a new principle, or rather to ascertain a principle, from decisions in cases as nearly analogous as can be found. In the cases of *Miller v. Race*, (1 Burr. 452.) *Grant v. Vaughan*, (3 Burr. 1516. and 1 Bl. R. 485.) and *Peacock v. Rhodes*, (Doug. 633.) the court lay stress on the fact, that the holder came by the notes for a full and valuable consideration *by giving money, or money and goods for them, in the usual course of trade; and I consider the real principle to be this, that the person passing the note, from the fact of his having possession, was the ostensible owner of it, and that the holder having, in the usual course of business, given credit to these appearances, which he was justified in doing, has been induced to part with his money or property *bona fide*; and that, as between him and the real owner, there must be a loss on one side or the other, the law will not divest him of fruits he has honestly acquired, without the possibility of remuneration. In other words, the equities of the parties being equal, the law leaves him in possession who already has it. But how are the equities here? The respondent was clearly and justly entitled to the proceeds of the sale of the vessel, the notes in question; his agents and trustees were guilty of a grossly fraudulent abuse of their trust, in attempting to deprive him of those notes. Admit that the appellants came to the possession of them without any knowledge of the fraud on the part of *Randolph and Savage*, in passing the notes, how is their situation altered, or what equities have they as against the respondent? If they have to account to the respondent for these notes, their situation is exactly as it would have been had the notes not been transferred to them; merely having had the good fortune to get the notes, without any new consideration, or renouncing any lien, their equity to hold the notes bears no comparison with that of the respondent to demand them. It was suggested, that they might have lost the benefit of some other security, had they not taken these notes; but of this there is no proof or probability. It is not shown, or pretended, that

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Randolph and Savage had any other security to give ; and it cannot be presumed, that they would have committed such a flagrant breach of faith, if they had any other available funds in their hands.

The appellants' counsel complained, that the chancellor had laid too much stress upon these notes not having been received in the usual course of trade. This is one of the tests which we find the judges applying, in order to determine the right of the holder to retain bills which have been passed by persons who have acquired possession by robbery, *finding, or fraud. Now, I understand, by the usual course of trade, not that the holder shall receive the bills or notes thus obtained, as securities for antecedent debts, but that he shall take them in his business, and as payment for a debt contracted at the time.

It has been strenuously urged that these notes are to be likened to cash, and that, had *Randolph and Savage* become possessed of the respondent's cash fraudulently, and paid it to the appellants, that then, clearly, there could be no remedy. There is a material distinction between cash and notes, in this, that money is not generally capable of identification. But suppose *Randolph and Savage* had robbed the respondent of a bag of gold, (and their conduct, on this occasion, in a moral view, is nearly as bad,) and paid it to the appellants as an indemnity upon antecedent responsibilities, would they have a right to hold it, if the identity could be traced ? I maintain they could not. Suppose that *Randolph and Savage* had been bailees of the respondent's goods, and had delivered them as security to the appellants, can there be a doubt that the respondent could have brought trover for the goods ? What is the difference, in principle, between the case last put, and the present ? I know it has been decided very often, and correctly, that the analogy does not hold between bills and goods, for that the possession of goods does not vest the property, and the transferee's title cannot be better than the transferrer's, but that, with respect to bills or notes, the whole property passes by endorsement. This is true only *sub modo* ; there is a *prima facie* ownership ; but the holder may be a mere servant sent to receive the amount of the bill, or he may be a bailee or a trustee, as *Randolph and Savage* were in the present case, and, therefore, it is because he is the apparent owner, and has power to receive the money as holder of the bill, that, if he passes it to a *bona fide* purchaser, upon a consideration paid at the time, his title shall prevail. This is not only right in itself, but the contrary doctrine would destroy the circulation of notes, and would justly alarm the mercantile world. But where the holder is not himself imposed upon by giving a new consideration for the bill ; where, in other words, he has not *been cheated, whether he retains the bill or not, he cannot have a property in the bill against the true owner.

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To test the principle still further ; suppose the appellants had been under no responsibilities for *Randolph and Savage*, and the latter had freely given them these notes, could they then insist on retaining them ? This, I believe, will not be asserted ; and yet, if the notes were the property of *Randolph and Savage*, because they were payable to them, and if a court could not look beyond the notes, their gift of them would change the property.

I understand Chief Justice *Eyre*, in *Collins v. Martin*, (1 *Bos. and Pull.* 651.) as meaning to say, that there must be a consideration paid when the bill is received. He says, "If it can be proved that the holder *gave no value for the bill*, then, indeed, he is in privity with the first holder, and will be affected by every thing which would affect the first holder." And in the case of *Joy v. Campbell*, (1 *Sch. and Lefroy*, 346.) Lord *Redesdale*, referring to Lord *Bolingbroke's* case, in the discussion of which a case was cited, which he mentions with approbation, where an executor transferred part of the assets for the avowed purpose of paying his own debt, in which case, the person receiving the assets was held liable, for, by this sort of dealing, the person concurs in a *devastavit*, as the value he gives for the assets is of a nature which it is impossible should be applied to the purposes of the administration. The administrator had the legal ownership; he had a right to sell the goods; but as the purchaser paid him nothing, but took the goods on account of his debt against the administrator, equity would not allow him to retain them. The case, in principle, is very analogous to the present.

I have not been able to bring my mind to doubt the correctness of the chancellor's decree, and I think it ought to be affirmed.

HOPKINS, Senator, concurred.

BOWNE, DUDLEY, HUNTINGTON, LIVINGSTON, MILLER, MOERS, and MORE, Senators, were of opinion that the decree of the Court of Chancery ought to be reversed.

*VIELIE, Senator. The respondent, residing in *Hudson*, and being the owner of the schooner *Express*, employed *Randolph and Savage*, merchants and copartners in *New-York*, defendants in the court below, as his agents or factors, to negotiate a sale of the schooner on credit, with instructions to take unexceptionable paper, and send the notes received, by some safe conveyance, or by mail, to the respondent. Under these instructions, *R. and S.* effected a sale, at the price of 3,875 dollars; and, on the third of *June*, 1819, received negotiable promissory notes for the amount, and for which an account is sought, by the bill filed in this cause. The notes thus received, notwithstanding the repeated applications of the respondent, were not transmitted to him, under the imposing pretence of retaining them until they should be counter secured for a guaranty, which they had voluntarily assumed, upon the sale of the vessel. On the 11th of *June*, and eight days after the receipt of the notes referred to, *R. and S.* stopped payment, and on the same day executed an assignment of all their effects and credits in *Connecticut* and *Massachusetts*, to *Jesse Savage*, for the benefit of the assignee, and of *Josiah Savage*, senior, and to secure the appellants for responsibilities. The next day, being the 12th of *June*, *R. and S.* transferred the notes in question, with others, to the appellants, without receiving any kind of payment or consideration for them, but merely as indemnity against responsibilities; and, on the 14th of *June*, *R. and S.* executed an assignment of sundry other effects and credits, to the appellants, and

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Thomas H. Smith, for the benefit of *Smith*, and to secure the appellants against responsibilities. Shortly after, and before the 17th of *June*, the respondent offering the required guaranty and payment of legal charges, called on *R. and S.* for his notes, but did not obtain them, nor any satisfactory account of them, as it would appear from the case, nor even an intimation of the disposition that had been made of them.

The appellants, in their answer, deny any knowledge that these notes were the property of the respondent, or had been received by *R. and S.* on his account.

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*Upon these facts, his honor the chancellor has decreed an account against all the defendants, and against *R. and S.*, for costs.

As against *R. and S.*, there can be no doubt of the propriety and correctness of this decree. They being the agents of the respondent, it is a case of ordinary equity jurisdiction, and their conduct in the transaction is marked with a character of deliberate fraud.

The appellants, however, claim to stand on different ground, and to be invested with other rights and greater privileges. Whatever might have been the difference between them, in a moral point of view, if a knowledge of the circumstances, under which these notes were held by *R. and S.*, had been brought home to the appellants at the time of the transfer, there can be little doubt, but that, in contemplation of law, and in the view of a court of equity, they would then, as assignees of *R. and S.*, have been in the same situation, and equally exposed to the respondent's claim.

But having, by their answers, denied notice of the trust, and any knowledge of the relation in which *R. and S.* stood, as factors to the respondent, it must be conceded that the appellants stand altogether in a different light, and that the question of their liability to account must be decided on different principles.

It was accordingly contended, on the argument, that the appellants having received the notes in controversy without notice of the trust, and upon a consideration not fraudulent in itself, that of indemnity for responsibilities before incurred, were entitled to hold them even against the true owner.

The rule by which this proposition is to be supported, had its origin in the commercial policy of that country from whence our system of jurisprudence is derived, and where every facility was rendered to the negotiation of commercial paper, and protection afforded to the *bona fide* holder, in all cases where the interests of trade were supposed to be promoted.

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By a recurrence, however, to the numerous cases upon this subject, from which the rule is to be extracted, and its *true extent ascertained, it will be found, that in no case has the title of the holder of negotiable paper been sustained against the true owner, except where value has been paid, or a new credit given in consideration of the transfer itself. And though indemnity for responsibilities is undoubtedly a good consideration for the sale or transfer of goods, or negotiable paper, as against the party making it, or his representatives, yet, in none of the cases cited on the argument, and in no one that I have been able to find, has it ever

been held to be sufficient to bar the true owner, upon a fraudulent transfer. IN ERROR

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A factor, though authorized to sell, cannot pledge the goods of his principal, because he has not the property in them. And the only reason why a different rule has been applied to negotiable paper, the avails, perhaps, of those very goods, and in the hands of the same agent, is because the interests of trade have been supposed to require, that every facility should be afforded to its negotiation, that thereby commercial credit might be extended, and when extended in good-faith upon the paper itself, it should be sustained. It has, accordingly, been held, that where a note or bill has been lost or stolen and subsequently disposed of to an innocent dealer, who gives credit to the paper itself, at the time he receives it, he may hold it even against the legal owner. (*Grant v. Vaughan*, 3 Burr. Rep. 1516. *Miller v. Race*, 1 Burr. Rep. 452., and the cases there cited.)

The latter being a rule of commercial policy, it can be applied only where the reason of the rule applies, and that is, where the transfer itself obtains a new credit, or, as was said on the argument, where it *does the office of negotiability*; as where money or goods are obtained upon the credit of the paper itself, and not where the transfer is founded upon a previous credit; because, in the latter case, the general interests of trade are in no way promoted, the only operation being, to effect a satisfaction of one person's claim, by an equal injury to another, thus leaving the benefit and disadvantage, so far as general interest is concerned, precisely balanced.

*Why should a rule, founded upon commercial policy, be extended further than that policy requires? That policy does not extend to a negotiation in consideration of previous credit, and, therefore, the rule itself ought not. It can hardly be deemed good policy in this country, whose interests are not so exclusively commercial as that from which we derive our notions of commercial law, to extend this, or any other rule, having for its object the favor of trade, any further than it has been carried there. And I venture the remark, that no case can be found, where a fraudulent transfer of negotiable paper was held to divest the true owner of his title, except where the receiver himself was not only innocent, but directly prejudiced by the credit given to the paper itself. In *Solomon v. Bank of England*, (13 East's Rep. 135. in note,) in trover for a note detained by the officer of the bank, on its presentment for payment, though the plaintiff had received the note *bona fide* from his correspondents, in reduction of the balance due him, from them, whose banker he was, yet, because there were circumstances of suspicion against his correspondents, (the note having been fraudulently obtained by some person,) and because the plaintiff had not paid a valuable consideration for the note before notice, he was nonsuited, and the court refused to set it aside.

It is not, therefore, the mere transfer of the bill or note to an innocent person, ignorant of the fraud, that will divest the title of the owner, but it must be transferred upon a sufficient consideration. (*Chitty on Bills*, 190.)

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What is to be deemed a sufficient consideration, is the true question; and though, as I have before remarked, an indemnity for prior responsibilities may be a sufficient consideration for some purposes, and between parties and their representatives, yet, in the absence of authority to support it, I think it has been shown, that, tested by the reason of the rule which has obtained in the courts upon that subject, it cannot be taken as sufficient in principle to bar the owner of his title, by a fraudulent transfer. It would be inequitable, unreasonable and unjust that the benefit derived by the party claiming to hold, without correspondent injury if *he could not hold, should be sufficient not only to countervail, but prevail over, the unmerited injury which the owner is to sustain by his consequent loss. The true test I take to be, that when the holder is left in as good a condition, after a retransfer, as he would have been had no transfer taken place there, the title of the owner shall prevail. This allows the rule, so far as it is dictated by commercial policy, to have its full effect, while it protects the owner of negotiable paper, necessarily intrusted, in the course of business, to the care of agents, from an injury revolting to every principle of moral equity.

If this be a correct guide to a decision upon this subject, there can be little doubt that the respondent's claim to the notes in controversy ought to prevail.

The appellants cannot, with any propriety, complain, that the respondent enabled *Randolph and Savage* to impose a false credit upon them; on the contrary, there is good reason to suppose, that the conduct of the appellants, in sustaining the pecuniary credit of *R. & S.*, to an extent apparently indiscreet, if not unusual, may have had a tendency to mislead the respondent. The respondent, however, never trusted to the pecuniary responsibility of *R. & S.*, as did the appellants, but merely relied upon their integrity to effect the sale, and transmit the notes that might be received by them. Nor is there any good ground of complaint to the appellants, that they have been prejudiced by trusting to these notes, to the neglect of other security. They were favored creditors of *R. & S.* The facts that the first assignment was made for their indemnity, without their knowledge, and that these notes were delivered to them, in violation of every legal and every moral obligation towards the respondent, show that they were highly favored by *R. & S.*, and yet, notwithstanding the subsequent assignment that was made for their benefit, in preference, and to the exclusion of the respondent's claim, they are losers, admitting the amount of the notes to be applied to the extinguishment of the debt arising from the endorsements for which they have since become liable. This is their own account of the matter in their answer, and it is not pretended *that they were induced to become endorsers by any credit derived from the property or notes of the respondent. These facts show, that the want of sufficient indemnity must have arisen from a want of means, and not from a want of disposition in *R. & S.* to place, and in the appellants to take, every thing tangible into their hands.

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In the view I have taken of the subject, the appellants obtained no legal title to the notes, as against the respondent, and the latter

saving the stronger equity, is entitled to an account. In my opinion, therefore, the decree appealed from ought to be affirmed.

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for affirming
22; for reversing 7.

The rest of the senators were, also, of opinion, that the decree of the chancellor ought to be affirmed. This being the opinion of a majority of the court,† the following decree was entered: "Counsel having been heard in this cause, and due deliberation being thereupon had, it is ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery, in this cause, be affirmed, and that the appeal be dismissed; and that the appellants pay to the respondent his costs in defending this appeal, to be taxed; and that the record be remitted," &c.

Decree of affirmance.

*GERRIT WENDELL, ROBERT MORRIS, and JOHN MATTHEWS, *appellants*,
against
JAMES WADSWORTH, *respondent*.

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APPEAL from the Court of Chancery. The respondent filed his bill, *May* 29, 1817, against the appellants, stating, among other things, that *John Thomas* was a soldier in the second *New-York* regiment of artillery, during the revolutionary war, and became entitled to a grant from the state of 600 acres of land, for his military services. That, on the 9th of *July*, 1790, letters patent were, accordingly, issued to him, for lot No. 11, in the township of *Solon*. That, on the 5th of *September*, 1789, the said *J. T.*, being so entitled to military bounty land, for a valuable consideration, sold, quit-claimed, and confirmed to the respondent, his heirs and assigns, forever, all the right, title and demand of him, the said *J. T.*, to military bounty lands, &c., with a covenant for further assurance, and a power of attorney to obtain letters patent for the land. This instrument of transfer concluded in these words: "In witness whereof, I have hereunto set my hand and seal, this 5th day of *September*, A. D. 1789;" and was signed by *J. T.* with his mark; but no seal was affixed to it, though it was witnessed by two witnesses, as "signed, sealed and delivered," in their presence. The instrument was deposited and filed in the office of the clerk of the county of *Onondaga*, according to the directions of the statute, on the 29th of *April*, 1795; and the execution of it was proved, in due form, before a master in chancery, on the 28th of *March*, 1799. *J. T.*, the soldier, died intestate. The appellants, who are in possession of the lot, claimed title to it, under a conveyance, as they alleged, from the soldier, which conveyance, if any, the respondent alleged, was obtained subsequent to the execution and deposit of the instrument to him as aforesaid, and with legal notice thereof. About five years since, the plaintiff brought an action of *ejectment in the Supreme Court

A deposit of deeds and conveyances, pursuant to the "act for registering deeds and conveyances relating to military bounty lands," passed 8th of *January* 1794, (sess. 17. ch. 1. s. 1. 2 N. R. L. 262.) and the act to amend the same, passed *March* 27, 1794, (sess. 17. ch. 44. s. 1. 2 N. R. L. 265.) in the office of the clerk of the county of *Onondaga*, is not legal notice to subsequent purchasers; nor is it equivalent, in that respect, to a registry. (a)

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(a) Vid. *Jackson v. Bowen*, 6 Cow. Rep. 141. 1 Rev Stat. 755.

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against the appellants, which was tried in 1814, and a verdict found for the plaintiff, subject to the opinion of the court, who decided, in *October*, 1815, that the instrument so deposited and filed by the plaintiff, not being under seal, was insufficient to convey the legal estate; and, on that ground, set aside the verdict, and gave judgment against the respondent. The bill prayed a discovery, and for relief generally.

The answer admitted, that *J. Matthews*, the appellant, was in possession of the lot, by permission of *W.* and *M.*, the other appellants, to whom and *J. M.* the lot, with other lands in *Schoharie*, were devised by *David Matthews*, of *Vermont*, in trust, for the children of the testator, named in the will, which was dated *August 29*, 1810. That *D. M.*, the testator, derived his title as follows: *John Thomas*, to whom letters patent for the lot were granted, bearing date *January 9*, 1796, by his deed; dated *October 25*, 1796, conveyed the lot in question to *William Preston*, in fee, for the consideration of 160 pounds, with covenants of seisin, &c. and warranty, which deed was acknowledged the same day before a master in chancery, and, on the 15th of *February*, 1797, recorded in the office of the clerk of *Onondaga*. *Preston*, by a deed, bearing date *August 29*, 1797, conveyed the same lot to *David Matthews*, the testator, for the consideration of 400 pounds, excepting 50 acres, in the south-east corner; which deed contained full covenants, and a warranty, and was duly acknowledged *August 30*, 1797, and, on the same day, recorded in the office of the clerk of *Onondaga*. *D. M.*, the testator, died *March 29*, 1811, and the appellant, *J. M.*, is his son. That *D. M.* paid *Preston* for the lot 750 dollars, and delivered him a mare, of the value of 250 dollars. That, in 1798, or 1799, one *Levi White* took possession of the lot under *D. M.*, and possession has ever since been held under the title of *D. M.* That improvements have been made on the lot to the value of 3,000 dollars. That *D. M.*, when he purchased, had not, as the appellant, *J. M.*, verily believed, any knowledge of the instrument held by the respondent, or of his claim to the lot; nor did he know of it, for many years afterwards, though he heard of the respondent's claim before his death. *That, in 1799, the appellant, *R. M.*, the son-in-law of *D. M.*, went into possession of part of the lot, and remained in possession until 1803, and never heard of the respondent's claim until 1800. The appellants admitted, that the respondent had brought an ejectment, and the proceedings and judgment, as stated in the bill.

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There was a general replication, and the cause was brought to a hearing on the pleadings and proofs. The chancellor on the 3d of *May*, 1821, decreed, that the appellants, within forty days, release and convey to the respondent, in fee, all the right, title and interest, derived to them, as trustees, by and under the will of *David Matthews*, of, in, and to, the lot in question. From this decree, an appeal was entered to this court.

The CHANCELLOR assigned the reasons for his decree; for which see *S. C. 5 Johns. Ch. Rep. 224. 227. 231.*

Henry, for the appellants, stated the following points :—

1. That the instrument of the 5th of *September*, 1789, under which the respondent claims title to the lot in question, not being under seal, or a deed, no legal estate passed, but it vested in the respondent a mere equitable interest, and made the patentee a trustee for him.

2. That *William Preston* and *David Matthews*, under whom the appellants derive title, were *bona fide* purchasers, for a valuable consideration, without any actual or constructive notice of the trust ; and, therefore, they hold the estate discharged from the trust.

3. That, on the ground of a constructive notice, actual notice being fully denied in the answers, and not proved by the respondent, a conveyance of the legal estate ought not to have been decreed, without an account and payment of all sums laid out for the permanent benefit and improvement of the estate, with interest from the times of disbursement, deducting the rents and profits. He cited 1 *Johns. Ch. Rep.* 300. 2 *Vesey, jr.* 554. 507. *Newland on Contr.* 515. 8 *Johns. Rep.* 137. 141. 1 *Ch. Cases*, 535. 2 *Ch. Cases*, 20. 208. 4 *Cruise's Dig.* 343. 349, 350. 4 *Vesey, jr.* 389. 8 *Bro. P. C.* 42. *Sugden's Law of Vend.* 402.

**Van Vechten*, contra, insisted on the following points :—

1. That the instrument of the 5th *September*, 1789, from *John Thomas*, the patentee, to the respondent, created such an equity as bound the lot in question in the hands of the patentee, his heirs and assigns, from the time the instrument was deposited and filed in the office of the clerk of *Onondaga*, on the 29th *April*, 1795.

2. That the appellants are chargeable with notice of that instrument, in consequence of the deposit and filing thereof, in the clerk's office of *Onondaga*, pursuant to the existing statutes, prior to the deed from *John Thomas* to *William Preston*, of the 25th *October*, 1796, under which the appellants claim to derive their title ; and they are, therefore, bound by the respondent's equity.

3. That the appellants, being chargeable with legal notice of the trust from the time of the deposit of the equitable conveyance from *J. Thomas* to the respondent, and with actual notice from 1806, are not entitled to any allowance for improvements. He cited *Newland on Contracts*, 504. 511. 2 *Powell on Contracts*, 38. 1 *Caines's Rep.* 8. 1 *Johns. Ch. Rep.* 27. 394. 2 *Johns. Rep.* 524. 18 *Johns. Rep.* 564. 2 *Atk.* 54. 2 *R. L. (K. and R.)* 262. s. 1. sess. 17. ch. 1. and p. 265. ch. 44. s. 1. *Act of the legislature*, passed *July* 25, 1782, and the concurrent resolutions of *March* 27, 1783. *Act of May* 11, 1784. s. 10; 11. *Act of February* 28, 1789. *Act of April* 6, 1790. *Act of January* 8, 1794. s. 1. *Act of March* 27, 1794. s. 1.

SPENCER, Ch. J. It is perfectly clear, that although *Thomas* had not a patent until 1790, yet any deed of conveyance made by him subsequent to the 27th of *March*, 1783, would have been valid,

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under the act of the 6th of *April*, 1790, and would have conveyed all his subsequent interest. It is also well settled, and has not been drawn in question, that the paper writing, from *Thomas* to *Wadsworth*, did not operate as a conveyance of the lot, for want of a seal. (12 *Johns. Rep.* 74.) It is equally certain, that as between *Wadsworth* and *Thomas*, and their heirs, the agreement, being founded on a valuable consideration, would be *carried into effect in a court of equity, by decreeing a specific execution thereof, by a conveyance in fee. It admits of as little doubt, that if *William Preston* and *David Matthews*, both of them, had actual knowledge of the agreement between *Wadsworth* and *Thomas*, when they respectively took their deeds, they and their heirs would be compellable to convey to *Wadsworth*. But there is no proof, nor pretence of proof, that either *Preston* or *Matthews* had such actual notice. The ground of the decree, and of the doctrine laid down by the chancellor, is, that under the act of the 8th of *January*, 1794, the paper writing from *Thomas* to *Wadsworth*, having been deposited, amounts to constructive notice; that is, that the writing having been deposited in the clerk's office, was notice to every subsequent purchaser, of the contents of that paper; and such subsequent purchaser was bound to take notice of it, and purchased at his peril. The chancellor has considered the deposit of these conveyances as intended by the legislature to be notice to all subsequent purchasers of their existence and contents; and that the deposit of them would have been, in a degree, useless, if it was not intended to operate as notice. The deposit, he says, as to all deeds and conveyances made prior to the act, was intended as a substitute for the prior registry, and to be, from the date of the deposit, equivalent to the recording; and he considers the terms of the statute comprehensive enough to embrace the case of the respondent's conveyance, for that it reached to every instrument of, or concerning those lands, and whereby they may be affected in law or equity, and he concludes, that the same construction ought to be given to this act, as to the act for the registry of mortgages.

I think it admits of much doubt, whether the act of the 8th of *January*, 1794, did embrace the respondent's case. The words are, "all deeds and conveyances heretofore made and executed." Now, it would seem to me, that "deeds and conveyances" mean the same thing; that they are used as synonymous expressions; and that, therefore, no paper which was not a *deed*, and did not convey the land from the grantor to the grantee, was within the words of the statute, or its meaning and intent. But I do not think it necessary *to discuss this point, as I have come to a satisfactory conclusion on the other.

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The preamble to the statute of the 8th of *January*, 1794, fully demonstrates the object and intention of the legislature, in that enactment; it states, that many frauds have been committed with respect to the titles to the lands granted by this state as bounty lands, to the officers and troops, &c., by forging and antedating conveyances, and by conveying the said lands to different persons, and by various other contrivances, so that it has become extremely

difficult to discover in whom the legal title to some of the said lands is now vested ; for remedy whereof, and in order to detect the said frauds, and to prevent the like frauds in future, the legislature enact, that all deeds and conveyances theretofore executed of or concerning those lands, or whereby they may be any way affected in law or equity, shall, on or before the first day of *May*, 1794, be delivered to, and deposited with the clerk of the city of *Albany* ; and all deeds and conveyances, (except mortgages duly registered,) theretofore made and executed, whereby any of the said lands may be affected, in law or equity, which shall not be delivered to and deposited with the said clerk, on or before the first day of *May* aforesaid, shall be adjudged fraudulent and void against the subsequent purchasers or mortgagees for valuable consideration. The act then directs the clerk of *Albany* to register the names of every person, whose name shall be to any deed as having executed the same, in a book to be by him provided for that express purpose, in alphabetical order, and annex to such name the date of the deed, and the name of the person to whom the same is granted ; the deeds are directed to be filed in bundles, marked in alphabetical order, "*to the end that persons inclining to have recourse thereto, may inspect the same, paying the usual fees for search and inspection.*"

The act then goes on to provide for future deeds, thereafter to be made and executed ; and it declares them void against subsequent purchasers for valuable consideration, unless they are recorded before a record of the deed under which the subsequent purchaser shall claim ; provided that *no deed shall be recorded, unless the same be duly acknowledged in the manner required by law.

I may venture to say, that, according to my knowledge or understanding, the construction put upon this statute, by the chancellor, is such as was never anticipated by the profession, nor imagined by the legislature ; and with the utmost deference, I must say, that, in my judgment, it cannot be supported. This act was considered, at the time of its being passed, as a high stretch of legislative authority. It was, however, universally approved, from the necessity of the case. The reasons which led to it are prefixed to the act itself. Various frauds and forgeries had been committed in relation to these military lands ; deeds had been antedated, and the same lands had been conveyed to different persons. That section of country was becoming valuable and inviting to settlers ; and it was deemed very essential to have the lands settled. Under these circumstances, as a means to detect the frauds and forgeries, it was judged highly necessary and expedient to call these deeds out of the hands of the holders of them, to bring them all together, *to the end that persons inclining to have recourse thereto might inspect the same.* The legislature express not only the reasons for passing the act, but the object also, which was to *give persons inclining to inspect the deeds the means of doing so.* It seems to me, that this declaration of the object of passing the act, was purposely introduced to prevent any misconstruction ; and that it negatives every idea, that subsequent purchasers were required, at their peril,

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to examine the deeds thus deposited. It amounts to this only; that such persons as choose to inspect them, may do so. How widely different is this permission to inspect these deeds, from a requirement that they must be inspected; and whether they are or not, that the mere deposit of them shall be notice to all subsequent purchasers!

It is true, that the doctrine is now wisely and correctly established, that the registry of a mortgage is notice to all subsequent purchasers and mortgagees. (2 *Johns. Rep.* 524. 18 *Johns. Rep.* 564.) This principle has many exceptions and qualifications under the *English* registry acts, which are not important to be traced or examined. But *there is a wide and manifest distinction between the act of the 8th of *January*, 1794, and the act concerning mortgages. In the first place, no mortgage can be registered until its authenticity is established, either by the acknowledgment of the mortgagor, or proof of its due execution before a public officer intrusted with powers for that purpose; and there is an express provision, that in case of several mortgages of the same premises, the mortgage first registered shall have preference according to the time of the registry; and it is further expressly provided, that no mortgage shall defeat the title of any *bona fide* purchaser, unless it be duly registered. Thus giving mortgages effect according to the priority of registry, and, by strong and necessary implication, declaring that they shall defeat the title of even a *bona fide* purchaser, if duly registered.

If we recur to the provisions of the act of the 8th of *January*, 1794, we find, that the deeds required to be deposited, were not required to be authenticated by any acknowledgment or proof. Many of them were, confessedly, forged; others had been antedated, and various frauds had taken place in relation to them. Under such facts, is it possible to conceive, that the legislature meant to have such deeds, with respect to which there was such alarm and suspicion, so far accredited as that the depositing of them should be notice to subsequent purchasers? Did they mean to impede and destroy the free alienation of these lands to *bona fide* purchasers, for valuable consideration, upon the contingency, that if, in this mass of deeds and papers, any of them were genuine, but not legally operative, that future purchasers should take notice of them at their peril? I think manifestly not. When, therefore, the legislature required these unauthenticated, unacknowledged, unproved and unrecorded deeds, to be deposited by a fixed day, and declared, that if they were not thus deposited, they should be adjudged fraudulent and void against subsequent purchasers for valuable consideration, they could not have intended to give greater effect to them than they had before, or to give them any preference over subsequent deeds, or to require subsequent purchasers, at their peril, to take notice of them. If the deeds or conveyances deposited, should prove to be *authentic and operative, the grantors would hold under them; but if they were defective and inoperative to transfer the title, they created no impediment to future transfers to *bona fide* purchasers for valuable consideration.

We perceive that, as regards mortgages, there is no express

declaration in the statute, that a registered mortgage shall be notice to subsequent purchasers; but we find a strong and irresistible implication, that they shall be notice. There is no such implication in the act of the 8th of *January*, 1794: but, I apprehend, there is a negation of any implication of notice, when the end of their being deposited is merely to give such persons as incline to have recourse to them, a right to inspect them. This is provided as a facility to individuals, but is not enjoined as a duty.

It was intimated, on the argument, that the principle of this decree would open the door most widely to litigation. I confess, without pretending to any knowledge of the fact, that I apprehend much confusion and litigation will arise, should the doctrine laid down by the chancellor be confirmed; but I am not influenced by any such considerations. My opinion is, that the deposit of these deeds is not notice, and never was intended to be notice, *per se*, to any subsequent *bona fide* purchasers for valuable consideration. Having come to this conclusion, most fully and satisfactorily, I abstain from considering the question of improvement, not because it has any difficulty, but because I consider it wholly unnecessary. My opinion is, that the decree appealed from ought to be reversed, and that the proceedings be remitted, with directions that the respondent's bill be dismissed, with costs, to be taxed to the appellants, in the court below.

PLATT, J., and WOODWORTH, J., concurred.

This being the unanimous opinion of the court, it was thereupon ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery be, in all things, reversed; and that the bill of the complainant in the Court of Chancery be dismissed, with costs to the appellants in the court below, to be taxed; and that the record be remitted, &c.

Decree of reversal.

*ABEL FRENCH, MATTHIAS FREDENDALL, and SIMON BRADT; JACOB LA GRANGE, an Infant, by ELIZABETH GRANGE, his Mother and Guardian; JACOB VAN NEST, and ELIAS KANE, *appellants*,

against

GILBERT SHOTWELL, *respondent*.

APPEAL from the decree of the Court of Chancery, of the 27th of *December*, 1821, on a rehearing on the plea of the defendant; (5 *Johns. Ch. Rep.* 555. 569. S. C.) and a decree of the 8th of *August*, 1822, on the report of the master, as to the *exceptions*

to which it relates, it may be ordered to stand as to so much of the bill to which it properly applies; and the defendant must answer as to the residue.

A decree or judgment, by consent, is binding and conclusive, unless procured by fraud.

Where the defendant himself waives his defence to a judgment, on the ground of usury, a subsequent purchaser, under him, with notice of the judgment, cannot impeach it.

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A plea may be good in part, and bad in part.

Where a plea is more extensive than the subject matter

IN ERROR. taken to the answer accompanying the plea, and to the further answer to the amended bill. (6 *Johns. Ch. Rep.* .)

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J. V. Henry, for the appellants.

H. Bleeker, contra.

November 13th. *The court* (*Vielie*, Senator, alone dissenting) being of opinion, that the decree of the Court of Chancery ought to be affirmed, the following decree was entered: "Counsel having been heard in this cause, and due deliberation being thereupon had, it is ORDERED, ADJUDGED and DECREED, that the decrees of the Court of Chancery, in this cause, be *affirmed*, and that the appeal be dismissed; and that the appellants pay to the respondent his costs, in defending this appeal, to be taxed, and that the record be remitted," &c.

Decree of affirmance

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*SAMUEL SLEE, *appellant*,
against

GEORGE BLOOM and others, *respondents*.

The respondents associated together for establishing a cotton manufactory, and became a corporation, for twenty years, according to the provisions of the act, (sess. 34. ch. 67.) passed March 22d, 1811; the seventh section of which act declares, "that for debts which shall be due and owing by the company, at the time of its dissolution, the persons then composing such company, shall

be individually responsible to the extent of their respective shares of stock in the said company." The corporation, on the 22d of November, 1816, executed a bond to the appellant, S., under their corporate seal, on which a judgment was obtained, in May, 1817. The corporation having been dissolved in February, 1819: *Held*, that the judgment debt of the corporation was binding and conclusive on the respondents, individually, to the extent of their respective shares.

Though the trustees or agents of the company were not the trustees or agents of the individual stockholders, yet they might bind the individual stockholders to the extent of their respective shares, in the event of a dissolution of the company. And the individuals, in such event, became liable for the debt so contracted by the trustees and agents of the company, and could not impeach the consideration of such debt, except by showing fraud or imposition in obtaining the bond, or that it was founded in error.

A defendant is not entitled to open an account, unless a sufficient foundation has been laid for that purpose in the answer.

It is not the proper course to refer to a master, an examination into facts, going to the merits of the cause, and as to which, proofs have been taken in chief, in the usual way.

and that, in order to ascertain such amount, the pleadings and proofs, in this cause, be given in evidence, and *such further competent proof as either party may think proper to furnish*; and that, on such reference, all *payments made by the defendants, respectively, on their shares, be duly credited: And, further, that the defendants, *Cyrenus Crosby, Albert Cox and George Bloom*, be allowed, by way of set-off, any demand which they, or either of them, have, and which ought in justice to be allowed; and that the master report with all convenient speed; and all further questions are reserved: and it is further ordered, that if any questions arise before the master, touching the admissibility of the proof, in relation thereto, the master be at liberty to apply for further directions, and to state, at the same time, the nature of the questions and of the proof."

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A reference was accordingly had before one of the masters of the Court of Chancery, who, on the 14th of *June*, 1822, made his report, as follows:—

"That, having been attended by counsel on behalf of the complainant and defendants in the above cause, and having proceeded upon the matters referred by such decretal order, certain questions of an equitable nature have arisen, which it would be for the advantage of all parties, should be brought before the court for decision, before a further investigation of the accounts is made; and under the authority to that effect, contained in such decretal order, I thereupon make this my separate report.

"In order to establish the amount of the debt due to the above complainant by the *Dutchess Cotton Manufactory*, an exemplification of the record of a judgment in the Supreme Court of the state of *New-York*, in favor of the complainant, against the said manufactory, has been produced before me; which judgment was docketed the 19th of *May*, 1822, and given for the sum of 46,986 dollars debt, and 30 dollars and 29 cents costs, such debt being the penalty of a bond to that amount, upon which such judgment was had.

"From the proved and admitted facts in this cause, it appears, that such bond was executed by the president, directors and company of the said manufactory, on the 22d of *November*, 1816, and was conditioned for the payment of 23,493 dollars and 35 cents, with interest from the 5th of *November*, 1816; that such condition was the balance of the account of the complainant with the manufactory, as finally *adjusted by the trustees; that, with a view to such adjustment, the said trustees had appointed a committee of three of the members of their board, the president and two others, the two last of whom reported their examination of such accounts, and a balance of 24,443 dollars and 35 and a half cents due to the complainant, from which amount 950 dollars were deducted by resolution of such trustees, and the bond was executed as aforesaid, for the balance, viz. the sum of 23,493 dollars and 35 cents.

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"The counsel of the complainant exhibited a statement of his claim, charging the company with the condition of the said bond, and interest, and giving credit thereupon for such sums of money as he alleged were properly to be allowed; and contended, that

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the balance so found was the true balance due from the said company to the complainant, and to be reported as such, unless further proper credits upon the amount of such condition could be proved by the defendants. On the part of the defendants it was then claimed and insisted, that the aforesaid liquidation of the accounts of the complainant, and the bond and judgment consequent thereupon, were not conclusive upon them as to the true amount of debt due to the complainant, but that they were at liberty to contest and falsify the same under the decree of reference, and the *remittitur* of the honorable the Court of Errors in this cause; and required that I should hear their allegations and proofs in relation thereto.

“And having considered such decree and *remittitur*, I am of opinion, that *they neither expressly direct* that the aforesaid judgment and liquidation should be received as conclusive, nor that the consideration or particulars of the same should be opened and gone into; but have left the same to be determined to be conclusive or *prima facie* evidence of the debt to be ascertained, according to the principles of equity applicable to the facts which should appear respecting them. In order to procure the said account to be opened, and certain items thereof investigated, the defendants have alleged, that there was fraud or error in such accounts in the following particulars:—

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“*They alleged, and offered to prove*, by the testimony in the cause, and further competent proof, that the land, site, *water privileges, dam, raceway, and the buildings, part of the property sold by the complainant, were not, at the date of such purchase, of one half the value at which they were charged by the complainant, and estimated by the committee of the trustees; that a portion of such land then pretended to be sold, and actually included within the boundaries in the deed to the company, had been previously sold and conveyed by the complainant, to one *George Reid*; that after such latter conveyance, the complainant had built the factory in part upon the land so conveyed to *Reid*; and that such facts had come to the knowledge of the defendants within a short time previous hereto. That the complainant had also, previous to such sale to the said company, sold or conveyed to said *Reid*, a water privilege for the use of his paper mill, to such extent as such paper mill should require, and that the privilege actually vested in such company, by his deed to them, was only the right to the surplus water not required by said *Reid* for such purpose; that of all these facts, the trustees, (other than the committee,) as well as the stockholders generally, were wholly ignorant, and that such committee were either not informed thereof, or, if informed, unwarrantably concealed them; and that the facts above mentioned materially diminished the value of the said premises below the amount of the charge and estimate.

“As to the above allegation and offer, *I report*, that I have concluded not to admit any proof as to any portion of such property being overvalued if the excess of valuation appears to be error of judgment merely upon a full knowledge of facts; but to require the defendants to show *unwarranted and deceptive representations*.

or concealment of material facts on the part of the complainant, or connivance of such committee with respect to the same. It has been further alleged by the defendants, that they had proved, by the testimony in this case, that the complainant had contracted to sell such factory and machinery, at the prices they originally cost him; that the spindles, part of such machinery, had originally cost the sum of 12 dollars, and had been charged and allowed for at the sum of 16 dollars.

"That it has been objected on the part of the complainant, *that the evidence in relation to such matter was clearly inadmissible, being statements made by the defendants in this case, who were examined under an order of this court, on the application of other defendants, and that, in my opinion, even if such evidence could be received, it does not establish the fact that such contract was made as a condition of the sale, and I find sufficient testimony to conclude, that the said sum of 16 dollars was not an unfair price; and that, in my opinion, no further evidence ought to be received in relation to the alleged contract, or to the value of such spindles. The defendants also alleged, that it is proved by the testimony in that cause, that a picker, part of such machinery, was charged 50 dollars higher than it had cost the said complainant, which was in violation of his alleged contract to sell to the company at cost, as well as an unjust overvaluation of the said article.

"The defendants further alleged, that manifest error appeared in the item of such account, allowing the sum of 1,416 dollars for the services of the complainant, from *January*, 1814, at the rate of 500 dollars a year, and a like allowance to *Nathan Moulthrop* for the same period; that such allowance commenced about one year and three months prior to the actual purchase of the premises by the company, and was illegally and unjustly allowed; and, further, that it appeared by the testimony, that such services were greatly overvalued. That there was, also, manifest error in such account in charging interest on the sum of 30,000 dollars, for two years and ten months, making such interest to be allowed for the period of more than one year prior to the purchase of such premises by the company.

"And that there was manifest error in a deduction of fifteen per cent. upon the proceeds of certain cloth and yarn sold at the factory by the complainant, as agent, which sum, it has been contended, is apparently a deduction by way of commission, for the use of the complainant.

"In these particulars, the defendants have alleged, that there were gross errors in such account, as well as in other items not particularized, and required that the same should be investigated. And having considered the matters above stated, and heard the arguments of counsel thereupon, I am *of opinion, and so report, that the defendants are entitled, on the reference now before me, to falsify and surcharge the said account at large; specifying, and going into proof of any error of such a nature and description as, upon a bill filed to open the account, if properly charged, and duly proved, would be declared a sufficient error by this court, to be amended by its direction."

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The appellant excepted, to the report, and filed his exceptions as follows :

“ 1st *Exception*. For that it appears by said report, that said master considered and adjudged that the decretal order, referring said cause to him, and the *remittitur* mentioned in said report, neither expressly direct that the judgment and liquidation mentioned therein should be received as conclusive, nor that the consideration of particulars of the same, should be opened or gone into, but left the same to be determined to be conclusive or *prima facie* evidence of the debt, to be ascertained according to the principles of equity, applicable to facts which should appear respecting them ; whereas the complainant contends, that the clear and legal import of the express direction given in said decretal order and *remittitur*, is to admit competent proof of payments made towards said judgment, but not to give any evidence to lessen, impeach or destroy the consideration on which said judgment was founded.

“ 2d *Exception*. That, although the master has determined not to admit any proof that the land, factory site, water privilege, race-way, and buildings, are overvalued, if the excess of valuation appears to be an error of judgment merely upon a full knowledge of the facts ; still he has adjudged it proper to permit the defendants to show what he denominates unwarranted and deceptive representations or concealment of material facts on the part of the complainant, or connivance of such committee with respect to the same ; whereas the complainant contends, that no such testimony can be given, under the pleadings in this cause, according to the rules of evidence, for that the defendants have not, in any part of said pleadings, alleged any such unwarranted and deceptive representations or concealment of material facts, nor have they in their answer, or otherwise, ever set forth or suggested, that any such encumbrance existed on said factory premises, or in relation to said water privileges, by means of any previous conveyance by the complainant to *George Reid*, or any other person, or that any part of said factory was built on said *Reid's* land ; and that it appears, according to the facts admitted and proved in the case, that the defendants have never sustained, and never can sustain any injury, by any such encumbrance, if the same existed.

“ 3d *Exception*. For that it appears, from said report, that the said master, in considering the proofs in the cause, considered the depositions of the defendants themselves as legal evidence in ascertaining the amount due to the complainant ; whereas, the complainant contends, that the depositions of the defendants, or any evidence given, or to be given by them, or any of them, relative to the subject of reference, is altogether illegal and inadmissible.

“ 4th *Exception*. For that the said master has adjudged and reported, that the defendants are entitled, on the reference, to falsify and surcharge the account at large, and the several items thereof, specifying and going into proof of any error of such nature and description as, upon a bill filed to open the account, if properly charged, and duly proved, would be declared a sufficient error by this court, and be amended by its direction. But the complainant

contends, that any such evidence would be illegal and inadmissible under the pleadings in this cause, for that the defendants have not in their answers, or any of them, alleged or averred any mistake or error in any item or items of said account, and that any testimony tending to show any such mistake or error in any of the items of said account, would be a surprise upon the complainant, and what he could not come prepared to meet.

“Addition to the 4th *Exception*. And that the defendants ought not to be permitted to surcharge or falsify as to any article contained in the first purchase made by the *Dutchess Cotton Manufactory* of the complainant, amounting to 30,912 dollars; for that it appears, by the pleadings and proofs in the case, that the price of all the articles was fixed and settled by the parties, by express contract, at the time *said purchase was made, and that the defendants cannot now be permitted to give any evidence to vary said price, or the terms of said contract.

“5th *Exception*. For that said report goes to open an account for examination, which has been settled by the defendants themselves, or some of them acting as trustees for themselves, and the other of said defendants, and after making large deductions from the amount of the complainant's original demand, by way of adjustment, and the correction of all errors, and executing a bond for the balance, and suffering a judgment to be obtained on said bond in a suit at law; and that without any allegation or suggestion in the pleadings, in this cause, of fraud or deception, on the part of the complainant, in obtaining said bond or judgment; whereas the complainant contends, that the defendants are precluded by said settlement, bond and judgment, from opening said account, and from any examination into the items composing the same, or any part thereof, and that said judgment ought to be received and considered by said master as conclusive evidence of the complainant's demand.”

The respondents also excepted to the report, and filed their exceptions, as follows:—

“1st *Exception*. For that the said master has stated, in his report, that he had concluded, if the accounts between the said parties should be directed to be opened and gone into, ‘not to admit any proof as to any portion of such property’ (meaning the property sold and conveyed by the complainant to the *Dutchess Cotton Manufactory*) ‘being overvalued, if the excess of valuation appears to be error of judgment merely, upon a full knowledge of facts, but to require the defendants to show unwarranted and deceptive representations or concealment of material facts on the part of the complainant, or connivance of such committee with respect to the same;’ whereas the defendants contend, that the said master ought to have determined and concluded, that any overvaluation of any part of the said property, might be shown by the defendants without restriction, and that the said defendants might be permitted to show, on the accounting before the master, what was the actual and fair value and worth of such property at the time of the sale.

*2d *Exception*. For that the said master, in the said report,

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has stated, that the defendants had alleged that it was proved by the testimony in the case that the complainant had contracted to sell the factory and machinery at the prices they originally cost him, and that the same had been in fact charged at a higher price, and that, "in his opinion, the evidence does not establish that such contract was made as a condition of the sale;" and that he finds 'sufficient testimony to conclude that the sum of sixteen dollars was not an unfair price, and that no further evidence ought to be received in relation to the said alleged contract, or to the value of such spindles;' whereas, the defendants contend, that the master ought to have decided, that the evidence does establish that such contract was made, as a part of the contract of sale; and that the defendants should be permitted to prove such contract by further and other evidence; and to show, by further evidence, what was the real cost of the said factory and machinery to the complainant; and to also show, by further evidence, what was the real and fair value of such spindles at the time of the sale.

"3d *Exception*. For that the master has reported, 'that the defendants are entitled, on the reference now before him, to falsify and surcharge the said account at large;' whereas, the defendants contend, that the said account ought to be opened generally, and the complainant be called upon to substantiate all the items of the same."

The cause was brought to a hearing in the Court of Chancery, on the exceptions taken by the parties to the master's report; and the chancellor, on the 17th of *September*, 1822, made the following order and decree:—

"This cause having been brought to a hearing at the last term, upon exceptions, taken on the part of the complainant, to the report of *Murray Hoffman*, esquire, one of the masters of this court, and the same being argued by Mr. *Philo Ruggles*, of counsel for the complainant, in support of the said exceptions, and by Mr. *Stockholm*, and Mr. *Thomas J. Oakley*, of counsel for the defendants, in opposition to the said exceptions, and the pleadings, and proofs, and documents in the cause, in the reference to the said exceptions, and the *master's report and the said exceptions being duly considered: it is ordered, adjudged and decreed, that all and singular the said exceptions be, and the same are hereby overruled. And inasmuch as the decisions of the master, on the points excepted to, in the first, second, fourth and fifth exceptions, and with the addition to the fourth exception, are correct, and the judgment against the company, in its corporate character, is not binding and conclusive upon the defendants, when charged in their private and individual character; and inasmuch as a sufficient foundation has been laid by the pleadings for opening the accounts; and inasmuch as the third exception does not appear to be founded on fact, as no such decision of the master, as is therein excepted to, appears in the report; and this cause having, at the same time, been brought to a hearing, upon exceptions taken on the part of the defendants to the said report, and the said exceptions argued by the same counsel, on behalf of the respective parties, as afore said, and duly considered: it is further ordered, adjudged and

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decreed, that the first exception, taken on the part of the defendants, be allowed, and that the defendants ought to be permitted to show before the master, if they are able, by competent and satisfactory testimony, a material overvaluation of the property referred to, in and by the said exceptions, at the date of the purchase thereof, from whatever cause such excess of valuation was produced. The great and leading principle applicable to most of the exceptions to the report being, that the acts of the trustees or agents of the company, while it subsisted as a corporation, however binding and conclusive upon the company in its corporate capacity, and over the corporate property, are not binding and conclusive upon the individual stockholders of the company, when charged in their persons and property in their individual character; inasmuch as, in that character, they never were represented by such agents or trustees. And it is further ordered, adjudged and decreed, that the second exception, taken on the part of the defendants, also be allowed; inasmuch as the defendants ought to be permitted to prove, if they are able, by competent and satisfactory proof, the contract therein referred to, and what was the real cost of the said factory and the machinery, to the *complainant, and what was the real and fair value of the spindles therein referred to, at the time of the sale. And it is further ordered, adjudged and decreed, that the third exception, on the part of the defendants, be overruled; and the question of costs, arising on the exceptions, taken on each side, as aforesaid, to the said report, is hereby reserved."

From this decree an appeal was entered to this court.

P. Ruggles, for the appellant, contended, that the decree of the Court of Chancery ought to be reversed, for the following reasons:

1. Because the statute (1 N. R. L. 247.) declares, "that for all the debts which shall be due and owing by the company at the time of its dissolution, the persons then composing such company, shall be individually responsible to the extent of their respective shares of stock in the company, and no further." And it is manifest from the same statute, as well as from general principles of law, that no contract can be made, or debt contracted in behalf of the company, but by the trustees; yet his honor the chancellor has decreed, "that the acts of the trustees or agents of the company, while it subsisted as a corporation, however binding and conclusive upon the company in its corporate capacity, and over the corporate property, are not binding and conclusive upon the individual stockholders, when charged in their persons and property in their individual character; which decree, the appellant insists, is in direct opposition to the statute, and would amount to a virtual repeal of the same, inasmuch as the individual stockholders can never be made liable under the act, unless they are liable to pay the debts of the corporation, according to the contracts of the trustees, as no other debts can exist against the corporation at the time of its dissolution.

2. Because, in and by said decree, it is adjudged and declared generally, that a sufficient foundation has been laid by the plead-

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ings in the cause for opening the accounts between the appellant and the company, thereby opening said accounts without restriction or limitation, and subjecting the appellant to be surprised by facts not put in issue, and *to objections of which he could have no previous knowledge, and which might be renewed and varied before the master, at the will of the defendants.

3. Because it is decreed, that the several exceptions taken by the appellant to the master's report, be overruled, and disallowed; whereas, the appellant insists, that the said several exceptions, for the causes and reasons therein assigned, were well and properly taken, and ought to have been allowed.

4. Because it is decreed, that the first exception taken by the defendants to the master's report be allowed, and that the defendants be permitted to prove, before the master, any material overvaluation of the property sold by the complainant to the *Dutchess Cotton Manufactory* at the time of sale, *from whatever cause such excess of valuation was produced*; whereas the appellant insists that no such proof can be legally admitted, as said property was sold by special contract, and the price agreed upon by the parties at the time of the sale; and especially after the opinion and decision of this court, that all charge, or pretence of fraud, in the sale of said property, was utterly without foundation.

5. Because it is decreed, that the second exception taken by the defendants to said report, be allowed, by the general allowance of which, it is, in effect, decided, that the master ought to have considered the testimony of the defendants themselves as sufficiently proving the contract, mentioned in said exception, though they were all directly interested in giving such testimony, and although said testimony was objected to by the appellant as illegal and improper.

6. Because his honor the chancellor has decreed, that, for the purpose of reducing the appellant's demand, the defendants ought to be permitted to prove, before the master, a pretended contract made by the appellant, to sell the factory and machinery to the company for the price which they originally cost him, though no such contract is alleged, or even alluded to, in the answers of the defendants, or any of them, or in any part of the pleadings; and that the defendants ought, for the same purpose, to be permitted to *prove what was the real cost of said factory and machinery to the appellant.

7. Because, by said decree, if carried into effect, the acts of the trustees, as agents of the company, and of the respondents, would be made conclusive and binding in all cases where their operation should be in favor of the respondents, but inoperative and void in all cases where their operation should be in favor of the appellant; and that at the election of the respondents.

He cited 1 *Atk. Rep.* 1. 3 *Bro. Ch. Cas.* 266. 2 *Bro. Ch. Cas.* 31. 1 *Madd. Ch.* 81, 82, 83. 2 *Vesey*, 565, 566. 9 *Vesey*, 266. 1 *Sch. & Lef.* 192. *As to opening accounts*: 1 *Vesey*, 289. 2 *Vesey, jr.* 51. 2 *P. Wms.* 93, 94. 1 *P. Wms.* 734—737. 3 *P. Wms.* 111. 3 *Bro. Ch. Cas.* 74. *Cooper's Enu. Pl.* 96. *As to interest*: 2 *Atk. Rep.* 212. 440, 441. *Ambl. Rep.* 584. 11 476

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Vesey, 358, 359. 1 *Vesey*, jr. 157—164. 5 *Vesey*, 803. 17 *IN ERROR*
Vesey, 26. 1 *Madd. Ch.* 491.

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Oakley, contra. He cited 3 *Johns. Ch. Rep.* 280. 1 *Madd. Ch.* 81, 82. 9 *Vesey*, 266. 6 *Vesey*, 486. 4 *Vesey*, 411. 14 *Vesey*, 409. 2 *Vesey*, 135, 136. 7 *Vesey*, 617. 3 *Day's Con. Rep.* 52.

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SPENCER, Ch. J. By the former decree of this court, the respondents were required to pay towards the discharge of the appellant's debt against the *Dutchess Cotton Manufactory* the amount of their respective shares of stock of 100 dollars each, or so much thereof as was necessary to pay the appellant's debt when ascertained.

In obedience to this decree, the Court of Chancery referred the ascertainment of that debt to a master, who has made his report to that court, and both parties have excepted to it; the appellant's counsel contending, that under the decree the master could receive no evidence to lessen, impeach or destroy the consideration of the judgment obtained by the appellant against the company. He also excepted to the report, contending, that no evidence can be taken by the master under the pleadings in the cause, of any unwarranted and deceptive representations or concealment *of material facts as to the value of the property sold by the appellant to the company, nor could any evidence be given of any encumbrances on the property, in consequence of any previous conveyance to *George Reid*, or any other person. Another exception is, that the master has reported that the respondents are entitled to falsify and surcharge the appellant's account at large, which, it is insisted, ought not to be done under the pleadings in the cause. These are the material points of exception on the part of the appellant.

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The respondents have also excepted to the report, (1.) because the master has decided not to admit proof of the overvaluation of the property sold, if such overvaluation appears to be the error of judgment only, upon a full knowledge of facts; the counsel contending, that he ought to have admitted such evidence without restriction, and that they ought to have been allowed to show the actual and fair value and worth of such property at the time of the sale; (2.) because the master ought to have allowed the defendants to prove, that the original contract of sale was, that the appellant agreed to sell the factory and machinery at the prices they originally cost him, and should not have decided, that they had failed to prove such contract; and, (3.) because the accounts ought to be opened generally, and the appellant required to substantiate all the items of the same.

The chancellor has decided, that the judgment is not binding or conclusive upon the respondents in their individual capacities, on the ground, that the acts of the trustees, while the corporation subsisted, however binding on the corporation and its property, are not binding and conclusive upon the individual stockholders, and he has also decided, that the master shall hear evidence of an overvaluation of the property sold to the company, from whatever cause such excess of valuation was produced. He has further

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decided, that evidence may be taken by the master of the actual cost of the factory and machinery to the appellant, and of the real and fair value of the spindles at the time of the sale; and all the exceptions taken by the appellant's counsel to the master's report, were overruled, and, *also, the third exception taken by the respondents' counsel. The principle adopted by the chancellor is, that the trustees of the company were not the agents or trustees of the individuals composing the company, and that, although the company was bound by their acts, the individuals were not.

This court did not intend to decide, on the former appeal, what constituted the appellant's debt, or whether the respondents were precluded from questioning the amount of it. The former decree of the Court of Chancery, which came under consideration upon the first appeal, had not decided upon that debt, nor had any principle been adopted in that court, deciding whether the liquidation of the debt by the company might be impeached or not. This court declined hearing arguments upon those points, and confined itself solely to the question, whether the corporation was dissolved or not; and, if so, whether the respondents were not liable by force of the statute to pay that debt when ascertained. The questions now come up, for the first time, whether, from the pleadings and proofs in the cause, the judgment rendered in favor of the appellant against the company is binding and conclusive on the respondents in their individual capacity; whether sufficient foundation has been laid by the pleadings for opening the judgment and the accounts on which it is founded; and whether the respondents can be permitted to show, before a master, a material overvaluation of the property sold by the appellant to the company, for any cause.

These inquiries involve the construction of the seventh section of the act relative to incorporations for manufacturing purposes. (1 *N. R. L.* 247.) That section enacts, "That for all debts which shall be due and owing by the company, at the time of its dissolution, the persons then composing such company shall be individually responsible, to the extent of their respective shares of stock in the said company, and no further."

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This court decided, on the former appeal, that the case contemplated by the statute had occurred, that the company was dissolved, and that the respondents were chargeable with the debt due from the company to the appellant, to the extent of their respective shares of stock in the company. *I perceive no escape from the conclusion, that the respondents are individually liable to the same extent that the company itself was liable. Whatever was a debt against the company, is now, by force of the statute, a debt against them, and if the company itself was concluded, the respondents are equally concluded. As an abstract proposition, it is undoubtedly true, that the trustees of the company were not the trustees or agents of the individual stockholders. The trustees could not bind the individual members beyond the funds of the company, with this qualification, that they could bind the individual stockholders, in the event of the dissolution of the corporation, to the extent of their respective shares, and no further. It is on this principle, and on

this distinction, that the trustees were, in the event which has happened, the agents of the stockholders. His honor the chancellor was of opinion, on the former appeal, that the trustees were, to a certain extent, the agents of the stockholders, for he held, that the resolutions of the trustees were a compact between the representative and constituent, between the trustees and the stockholders, and he decided, that they might, therefore, avail themselves of resolutions, to which, in no other sense, were they parties. This principle was adopted and approved by this court, with the qualification, that such resolutions must be fair and equitable, and not founded in fraud. This court gave effect to a resolution, passed with the appellant's assent, to accept *fifty per cent.* on the shares, while they refused to give effect to a resolution subsequently passed, against the appellant's assent, absolving the stockholders from all further payments, on their paying *thirty per cent.* on the ground that it was a legal fraud.

I must conclude, therefore, that the respondents are chargeable with the appellant's debt, on the principle that the trustees, as their agents, have contracted this debt, and because the statute fixes their liability. The respondents cannot, therefore, impeach the consideration of the debt, in any other manner, nor on any other ground than any principal can be allowed to impeach a debt contracted by his legally authorized agent. If, then, it has been shown that the sum claimed as a debt was fraudulently enhanced, *or that the liquidation of the account is either fraudulent or founded in error, provided a foundation has been laid for such proof, the respondents would be entitled to relief. And we must regard the judgment as a solemn admission merely, on the part of the company, of indebtedness, for it is not of itself, as *res judicata*, binding on the stockholders, if it was procured by fraud, or is founded in error. I do not perceive the necessity of a cross bill for this purpose. The appellant has minutely stated in his bill the origin and consideration of his debt, and the manner of its final liquidation; and it was competent to the respondents, in their answers, to impeach it for the causes I have stated. But they were bound, if such was their purpose, to specify in their answers the particular facts on which they relied. It is a just and well-established rule, both in law and equity, that matter in avoidance must be stated with precision and certainty, so that the opposite party may not be surprised by evidence unwarranted by the pleadings.

This brings us to the inquiry, whether the respondents have, in their answers, set up fraud and imposition in contracting this debt, or error in the settlement of the account. We must bear in mind, that there are two transactions only to be investigated: the original sale of the factory and machinery, on the 7th of *February*, 1815; and the settlement of the appellant's account, in *November*, 1816, by a committee of the board.

The answer alleges, that when the report was made by *Crosby*, there were only 400 spindles, and not 912, and that they cost only 9 dollars each: That they were not worth more than 10 or 12 dollars, and not 16 dollars, as the plaintiff fraudulently procured

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them to be estimated. And again, the answer alleges, that the report of *November*, 1816, was not made from any examination by the persons who signed it, but on the appellant's statements, which were not warranted by the truth; and that the factory and machinery were not worth, on the 7th of *February*, 1815, 24,000 dollars. And again, that the deed given by the appellant contained covenants of seisin, and of a good right to sell; whereas there were two mortgages on a tract of 200 acres of land, including the site of the factory, the one to *John* Cope*, for 2,400 dollars; and the other to the *Washington Insurance Company*, for 12,000 dollars, which were then due, and carrying interest, and that these encumbrances were not disclosed, but concealed. These are all the suggestions of fraud in the sale, or error in the accounts, set up by the answers.

The factory was built, and in operation, some time before the sale to the company, and it was situated within a short distance of *Poughkeepsie*, where the respondents reside. Before the purchase was made, the company, by resolution, instructed their treasurer and secretary to confer with the appellant, and report, at their next meeting, at what price the company could purchase of him the land and factory, stock and materials, then belonging to him. On the 7th of *February*, Mr. *Crosby*, the treasurer, reported, in the absence of the secretary, that he had conferred with the appellant, and that the factory, in its then present state, and all the rights vested in the appellant, and *which ought to belong to the factory*, with two acres of land, on which it was built, ought not to be purchased by the company at a greater sum than 30,912 dollars; and he presented a detailed statement of the several items, making the aggregate amount. The report does not state that 912 spindles were in operation, but states merely 912 spindles, at 16 dollars, 14,592 dollars.

It appears, from the evidence of many witnesses, and, among others, from the depositions of *Stafford*, *Cunningham*, *Herrick* and *Schenck*, that the spindles were not overcharged. They estimate them as worth from 15 to 17 dollars. It does appear that the appellant had engaged them at 10 dollars; but *Aaron Stafford*, with whom the contract was made, testifies, that 480 were then in operation, and 432 more were preparing, and under good way: and that the appellant, in consideration of the appreciation of the price, had agreed to give him 12 dollars instead of 10 dollars, and had also agreed to give him what the company gave. The report then did not misrepresent the state of the spindles, for there were 912 in operation or to be put in immediate operation; and the report evidently alluded to this, in speaking of "the rights vested in the appellant, and which ought to belong to the factory;" and as to the price, it was the fair medium value.

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*It is not proved that the appellant agreed to sell the factory and machinery at what it cost him, nor is this alleged in the answers. The allegation is, that they were not worth 24,000 dollars on the 7th of *February*, 1815, and this would be decisive against the suggestion, were it really so. Mr. *Tallmadge* testifies, that after the

incorporation, a conversation took place in regard to taking the factory of the appellant, and he offered that the company should have the factory and machinery at what they had cost him; and the appellant intimated, that he should consider that an allowance was to be made to him for his personal services and attention in building the factory, as he had given his entire time and services to it, for two years and upwards, and said, he should claim 1,000 dollars. That the conversation was loose, and without any conclusion, and a committee was appointed to examine the factory and report as to the value, which was accordingly done; that after the report, a considerable conversation took place respecting it, in the course of which the appellant said, that the sum reported was below what the factory had cost him, and it being objected that the amount was greater than had been expected, the appellant said, he should submit to the report, but would prefer having the report set aside, and have the value fixed by indifferent men, to be bound by their decision, and that he should be a gainer by such valuation, believing it would be made at a higher sum than that reported by the committee. That the board inclined to hold to the report of the committee, which was unanimously adopted by the trustees. Mr. Tallmadge says, he considered the sum at which the factory was taken not to be higher than the first cost, which opinion was founded on the appellant's representations before stated. I perceive no pretext for saying, that the appellant was guilty of any misrepresentation or concealment as to the value of the property sold by him; it was all visible, and the respondents and their committee had ample means of examining and judging for themselves; and whatever may have been said preparatory to the consummation of the bargain, it is very certain that the trustees acted on the report of their treasurer. The subscription to the stock took place after the agreement by the trustees to purchase; and if the stockholders, with their eyes open, and the means of information at hand, were content to become members of the corporation, without due consideration, or examination, they must ascribe their losses to their own want of prudence and caution. But we do not hear a lisp of complaint, until the events of peace had materially changed the aspect of affairs, and rendered the stock less valuable; and even after that period, we find the stockholders paying up calls on their stock, without any objection that they had been defrauded; and, indeed, there is no trace of any complaint as to the fairness of the transaction of sale, until the concerns of the establishment were overwhelmed with ruin; and, even in their answers, the respondents do not pretend that the factory and machinery were agreed to be sold at what they cost the appellant.

To admit proof, at this period, that the factory and machinery were not worth what was agreed to be given, would violate every principle of reciprocity. The contract is executed, and the appellant is finally concluded as to price. Had political events terminated differently, it appears, from all the evidence, that the speculation would have been a profitable one. Can it then be seriously

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urged, that, because events have turned out unpropitiously, the respondents, who took their chance in those events, shall not abide the loss? Besides, the respondents have ratified the acts of the trustees, by subscribing for the stock, by paying repeated calls, and by their entire silence for so long a time in making any complaint of the purchase.

It has been urged, that several of the stockholders and trustees who took a principal agency in making the contract of purchase, have become insolvent, and have ceased to have any interest in the result of the cause. They were not insolvent when the affairs of the company were confided to their management, and they have not been charged with any fraudulent combination with the appellant, to betray their trusts, and defraud the other stockholders. They were themselves deeply interested in making the purchase, on the best terms they could; and this consideration refutes any suggestion, that they consented to an overvaluation of the property, or that they did not consider it to be worth what they gave; and I cannot but repeat what was said on a former occasion, "The charge is so destitute of foundation, that *it does not deserve a serious refutation." On this branch of the subject, my opinion is, that the sale and purchase, founded on the report of Mr. Crosby, of the 7th of *February*, 1815, is binding and conclusive on the respondents in their individual capacity, and that no foundation has been laid for opening that transaction, which has not been sufficiently and fully removed by the proofs.

With respect to the appellant's account, adjusted by a committee of the trustees, on the 5th of *November*, 1816, many exceptions have been taken not warranted by any allegations in the answers. *Herrick* and *Cunningham*, who settled that account, have not been interrogated in relation to it, whether the items were correct, nor on what principles it was adjusted. It is, therefore, evident, that the exceptions now taken were not thought of when the witnesses were examined. If I could discover any principle, on which that account could be reinvestigated, I should readily assent to it; but there is no ground laid for such reëxamination in the pleadings. It is no where alleged, that any particular items of that account are false, or that the charges and credits are erroneous. It is generally stated, in Mr. *Bloom's* answer, "that it was not made from any view or inspection, by the persons who signed the same, of the state of the factory, or accounts of the appellant; but was made on certain statements and allegations of the appellant, not warranted by the truth of the facts, and represented a balance not due to the appellant, and, therefore, ought not to be binding on the respondents; for the factory, machinery, &c., as the same were situated on the 7th of *February*, 1815, were not worth 24,000 dollars."

The only issuable facts, set up by this answer, are, that the account was made out without any view or inspection by the persons who signed it, of the state of the factory and accounts, and that the factory and machinery were not worth 24,000 dollars, on the 7th of *February*, 1815. *Nathan Moulthrop* testifies, that exhibit C. contains the items referred to in exhibit B., and that all the articles

in exhibit C. were examined by *B. Herrick*, as a committee of the company, and were found in and about the factory. I forbear to add any thing to what has been said on the last fact, the value of the factory and machinery. Here, too, *we must remember, that the committee, who settled that account, were personally interested in reducing the amount due the appellant as low as they could; and we find, in exhibit D., that they made two deductions, amounting to 684 dollars, on the first purchase. In addition, *Cunningham* states, that the account was made out with care, that the balance was reported to the trustees, who approved of the report after making another deduction of 950 dollars, which balance, he says, so adjusted, was considered a final balance due to the appellant from the company. *Herrick* fully concurs in this statement. From all these considerations, I perceive no grounds to consider the accounts, thus settled, liable to be reopened. The balance, thus settled, the trustees afterwards confirmed, by giving a bond for its payment, and when sued on that bond, they confessed judgment; and it is worthy of remark, that some of the very persons, who took an interest in urging the giving this bond, and confessing the judgment, seek to set the whole aside as a gross imposition.

I cannot think that the course adopted, of referring to the master an examination into facts that went to the merits of the cause, and with respect to which proofs had been taken in chief, in the usual way, was a correct or proper procedure. If the respondents are concluded from an examination into the original purchase of the factory and machinery; and if they are, in like manner, concluded from opening the account, either from the imperfection of their answer, or from the proofs in the cause, there was nothing to refer to a master on these points. I do not understand, that facts, which relate to the *gist* of a controversy, which the plaintiff is bound to prove, to entitle himself to relief, or which a defendant is bound to prove, in avoidance or discharge of the demand, are ordinarily referred to a master. Matters of account are thus referred, when the principles upon which they are taken have been previously settled by the court. My conclusion, as regards the account of the appellant, is, that there is no foundation laid, by the answers, for impeaching it, which has not been fully and satisfactorily met and repelled; and that, consequently, the appellant's debt against the company, of 23,493 dollars 35 1-2 cents, must be considered as conclusively established at that *amount; and this balance must be considered as conclusive and binding on the respondents in their individual capacity, according to their respective shares of stock.

With regard to the two mortgages, there is no foundation for the allegation that they were concealed from the company or stockholders. The proof shows, that they were known to several of the stockholders, and that negotiations were entered into for the assumption of them by the company. The land mortgaged included 230 acres, exclusive of the site of the factory, and these 230 acres were then considered to be worth 25,000 dollars,

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a sum amply sufficient to pay off the mortgages. It has been urged, that the appellant violated his warranty, in the deed to the company, in consequence of the prior sale to *Reid*, of a water privilege for a paper-mill. This formed no part of the defence set up in the answers; and the proof in relation to it was irrelevant and inadmissible. Had it been alleged, possibly it might have been shown, either that the fact had been made known to the company, or that it was not injurious, from the abundant supply of water. We cannot now notice the proof.

I am, upon the whole matter, for reversing the chancellor's decree, in overruling the 2d, 4th, the addition to the 4th, and 5th exceptions, taken by the appellant's counsel to the master's report; and I am, also, for reversing the decree, allowing the 1st and 2d exceptions, taken by the respondents' counsel to the master's report; and am in favor of a decree, carrying the principles I have stated into effect.

† Nov. 18th.
For affirming
in toto, 8; for
reversing in
part, 16.

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A majority of the court† being of the same opinion, it was, thereupon, "ORDERED, ADJUDGED and DECREED, that those parts of the decree of the Court of Chancery, by which the second and fourth, with the addition to the fourth, and fifth exceptions, taken by the appellant to the report of *Murray Hoffman*, Esq., one of the masters of the Court of Chancery, are overruled; and, also, by which the first and second exceptions taken by the respondents to the report of the said master, are allowed; and, also, all those parts of the said decree which arise from, and are in consequence of the overruling of the said first-mentioned exception, and which arise from, and are in consequence of the allowing of said last-mentioned exceptions, be reversed; and that the *said cause be remitted to the said Court of Chancery, and that the said court enter a decree against all of the above-named respondents, according to the former decree of this court, in this cause. That the said respondents respectively pay to the appellant, towards the discharge of his judgment and costs in the Supreme Court against the *Dutchess Cotton Manufactory*, in the pleadings and proofs mentioned, the amount of their respective shares of stock in said company, of 100 dollars each share, or so much thereof as shall be necessary to pay the amount due on the said judgment, when such amount is ascertained; and that the condition of the bond or which said judgment is founded, and which is, also, in the said pleadings and proofs, be considered as conclusive evidence of the amount due from the said *Dutchess Cotton Manufactory* to the appellant, at the time the same was given, according to the terms of the said condition. But the amount of any payment which has been made by the *Dutchess Cotton Manufactory* to the appellant, since the twenty-second day of *November*, in the year one thousand eight hundred and sixteen, at which time the said bond bears date, is to be deducted from the amount so due to him; and from the amount of the several sums to be paid by the respondents, as aforesaid, there is to be deducted such amount as shall appear to have been paid by them, respectively, upon their respective shares

of stock in said company. *And inasmuch* as it appears, that the appellant has assumed thirty shares of said stock, formerly belonging to *James Tallmadge, jr.*, ten shares formerly belonging to *Aaron Stafford*, and ten shares formerly belonging to *Robert Stafford*, the same are to be considered as contributing, in discharge off the appellant's said debt, to the amount now due on said shares so assumed, or in such proportion as the respondents are respectively required to pay upon their shares; *and*, if it shall appear, that the said *Cyrenus Crosby*, *Albert Cocks* and *George Bloom*, or either of them, are creditors to the appellant, as they have asserted, and have demands which ought, in justice, to be set off towards the demands of the appellant, and which are susceptible of adjustment before a master, such set-off is to be made in their favor."

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CASES
ARGUED AND DETERMINED
IN THE
Court for the Trial of Impeachments
AND
THE CORRECTION OF ERRORS
OF THE
STATE OF NEW-YORK,
IN FEBRUARY, MARCH AND APRIL, 1823.

JAMES GOODELL, *plaintiff in error,*
against
JAMES JACKSON, *ex dem.* PETER SMITH, *defendant in error.*

IN ERROR to the Supreme Court. *Vide, S. C. ante, p. 188—*
194.

A patent for
 land to J. S.,
 an Oneida In-
 dian, and his
 heirs and as-
 signs, forever,
 is to him and
 his Indian heirs,
 whatever their
 civil condition
 and character
 may be, wheth-
 er aliens or citi-
 zens.

Such a pat-
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 ent is to be
 taken as issued
 by due author-
 ity, and as
 equivalent to a
 legislative grant
 to J. S., and
 his Indian heirs.

The *Indians* within this state are not *citizens*; but are distinct tribes or nations, living under the protection of the government. (a)

No white person can lawfully purchase any right or title to land from any *Indian* or *Indians*, without the au-
 thority and consent of the legislature.

A deed, therefore, executed in 1797, by the son and heir of J. S., an *Indian* patentee of land, to a citizen, in
 the usual form, without any such consent, is illegal and void. (b)

Storrs, for the plaintiff in error, contended, 1. That *William Sagoharase*, the *Indian*, the grantor of the plaintiff's lessor, not being a citizen of the state, could not take lands by descent, as heir to his father, *John S.*, the *Indian* patentee of the lot in ques-
 tion; and, of course, could not convey a title to the lessor of the
 plaintiff. If the *Indians* in this state are *citizens*, according to the
 doctrine laid down by the Supreme Court, then they are citizens
 also of the *United States*; and it would follow, that all *Indians*
 within the *United States* were citizens. It is not enough for the
 counsel for the defendant in error to show, that *Indians* are not
aliens, in every sense of the term; but they must show, that they
 have a legal capacity to inherit, or take land by descent. If *John*
S. was not a citizen in 1783, it must be shown at what time, in

1 Rev. Stat. 719, 720.

North Hempstead v. Hempstead, 2 *Wendell's Rep.* 109. *Lee v. Glover*, 8 *Cow. Rep.* 189. *Jackson v.*
5 Cow. Rep. 397. *Clark v. Phelps*, 4 *Cow. Rep.* 190. *Jackson v. Adams*, 7 *Wendell's Rep.* 367.

what manner, and by what act, his son, *W. S.*, became a citizen. These *Indian* tribes have never been treated, nor considered, by the government of the *United States*, as citizens. The question is, not whether they reside within our territory or jurisdiction; but whether they form a part of the *body politic*, or *people* of the state. The words "people" and "citizens," in their political sense, are synonymous. (7 *Mass. Rep.* 525.) *Indians* are not, therefore, comprehended either in our constitution or laws. The *United States* have made various *treaties* with the *Indians* residing within this state, the articles of which are totally repugnant to the idea of their being citizens. (*Laws of U. S.* Vol. 1. p. 307. 309. 323. 377. 379. 384. 424.) So, the explanatory article of the 4th of *May*, 1796, to the third article of the treaty of 19th of *November*, 1794, between *Great Britain* and the *United States*, recognizes and considers the *Indians* as independent, and distinct from citizens. We do not enforce our rights against the *Indians* by process of law, but by arms.

Again; by the statutes of the state, *Indians* are regarded in the same character. (2 *N. R. L.* 153. sess. 36. ch. 92.) (a) All contracts with them relative to their lands, under any pretext or color of right whatsoever, are prohibited. No person can sue or maintain any action against any *Indian*; nor can any *Indian* sue in our courts, unless by an attorney appointed in the manner prescribed by the act. (14 *Johns. Rep.* 335. 19 *Johns. Rep.* 127.) Now, if these *Indians* are *citizens*, all these statutes, being repugnant to the constitution of the *United States*, as well as to natural right, are void. By the several treaties of 1785, 1788 and 1810, to be found in the office of the secretary of state, (*Book of Treaties*, 147. 150.) made with the *Oneida Indians*, they are declared to be the sole and absolute proprietors of their lands. By the 37th article of the former constitution of the *state, no purchases or contracts for the sale of lands, made since the 14th of *October*, 1775, or thereafter to be made, with *Indians*, within this state, shall be deemed binding on them, or valid, without the consent of the legislature. These *Indians* have received no patent or grant for their lands, either from *Great Britain*, or from this government. By what right, then, do they hold their lands? Clearly, by the law of nations, as independent tribes. In the case of *Jackson, ex dem. Klock, v. Hudson*, (3 *Johns. Rep.* 375.) it is assumed, as an undoubted and notorious fact, that the *Mohawk Indians* possessed their lands as an independent nation. By the 55th section of the act, (sess. 36. ch. 92. 2 *N. R. L.* 153. 175.) (b) it is declared, that the heirs of each of the *Indians* to whom land has been granted by this state for military services, &c., shall be, and are thereby made capable of taking and holding any such lands, by descent, in the same manner as if such heirs were citizens of this state, at the death of his, her, or their ancestors. This is a most explicit legislative declaration, that these *Indians* are not citizens. The declaratory act of the last session (sess. 45. ch. 204.) is a legal truism, for it never could be doubted, that the jurisdic-

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(a) 1 *Rev. Stat.* 719.

(b) 1 *Rev. Stat.* 719, 720.

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tion of our courts was co-extensive with the jurisdiction of the state.

In *Calvin's* case, (7 Co. 1. 35. 47.) Lord Coke, in stating the incidents, or requisites, to make a natural *born subject*, says, that the parents must be under the actual *obedience* of the king. A child born of an *enemy* in *England*, is not a subject of the king; for he cannot be a subject, "unless, at the time of his birth, he was under the *ligeance and obedience of the king*." Now, these *Indians* were never under *obedience* to the government of the state. They could not be taxed, nor could military services be required of them. Have they ever consented to assume the obligations of our laws? The bonds of civil and social relation formed among them, by their condition and customs, would be destroyed by our laws. *Vattel* (Book 1. ch. 1. s. 4, 5.) says, that a weak state, which has bound itself by *unequal alliance* to a more powerful one, under whose protection it has placed itself for safety, does not, therefore, cease to be a sovereign state, acknowledging no law but *that of nations. These *Indian* tribes or nations have formed such *unequal alliances* with our government. Their condition is somewhat analogous to that of the *allies* or *friends* of ancient *Rome*. Our commissioners, in negotiating the treaty of *Ghent*, in which the case of the *Indians* within the *United States* was much discussed, said nothing from which it can be inferred, that these *Indians* were not considered by us as independent. They merely contended, that *Great Britain* was estopped from treating them as independent nations, within our territory. But the act of the 18th of *March*, 1788, (sess. 11. ch. 85. 2 *Greenl.* ed. *Laws*, 194.) is conclusive on this subject. Though the *preamble* speaks only of *Indians*, yet the first enacting clause prohibits any contract for the purchase of lands with any *Indian* or *Indians*, without the consent of the legislature. The enacting clause of a statute may be broader than the *preamble*. (*W. Jones's Rep.* 164. 8 *Mod.* 144. 1 *P. Wms.* 520. 3 *Atk.* 204.) The act extends as well to *individual Indians* as to tribes of *Indians*, in their natural capacity, as being within the mischief which the statute intended to remedy. This statute was reenacted without the *preamble*, in 1801, (1 *Kent & Radcl.* ed. *Laws*, p. 464. sess. 24. ch. 97.) and the meaning of the revised act is precisely the same as that of the original statute: (4 *Mass. Rep.* 470. *Plowd.* 86.) The word "*Indian*" cannot be rejected as unmeaning. If individual *Indians* could convey their lands, the statute would be a dead letter. (*Bac. Abr.* tit. stat. I. 2. *Vin. Abr.* tit. stat. E. 6. pl. 100, 101. *Cowp.* 543.)

The case of *Jackson, ex dem. Gilbert, v. Wood* (7 *Johns. Rep.* 290.) was decided on the statute of the 18th of *March*, 1788, not on the revised act of 1801, as was erroneously supposed, in the case of *Jackson v. Sharp*, (14 *Johns. Rep.* 472. 475.)

D. Cady, and *Talcot*, (A. G.) contra, contended, 1. That the patent to *J. S.* purported to convey, and would have conveyed to him, had he been living, an estate transmissible by descent as well as by purchase; and as, by the statute, the patent relates back to the time of his death, and the *estate is to be deemed vested at

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that time, the fact of his dying can make no difference, and his son, who conveyed to the lessor, being his heir at law, was capable of taking by descent, though he was an *Oneida Indian*, and residing with his tribe. Where the question of citizenship is doubtful, it ought to be construed in favor of the person claiming the rights of a citizen. The principle of the common law, by which it is attempted to defeat the title derived from the *Indian* grantor, is barbarous. (*Vattel*, B. 2. ch. 8. s. 112.) It is for the plaintiff, who denies the citizenship of the *Indian* grantor, to show to what sovereign he belongs. These *Indians* were the mere children of nature, attached to no sovereign; but according to the maxims of the common law, they became citizens of the state at the time of the formation and establishment of its government. If we look to the records and acts of the colonial government, we shall find, that the *Indians* were then considered as subjects of the king of *England*. (*Minutes of the Governor and Council in the Secretary's office*, Vol. 3., Vol. 5., and Vol. 6., in 1670, 1676, 1683, 1684, 1686, 1675; 1705, 1711, 1721, 1722.) In 1727, in the volume of commissions, Mr. *Livingston* is described as agent, &c. for the *Indians*, our subjects, &c. Could the king, afterwards, deny that the *Indians* were his subjects? Laws were passed in 1700, and 1744, for their protection. (*Colden's Hist. Five Nations. 15th Article Treaty of Utrecht.*) On the 16th of July, 1776, the convention of the state established a rule, by which it was to be ascertained who were to be considered as citizens. They resolved, "that all persons abiding within the state of *New-York*, and deriving protection from its laws, owe allegiance to the said laws, and are members of the state;" and this resolution was confirmed by the constitution, afterwards formed and established. There is no exception. Every man, including the *Indians*, within the limits of the state, who were subjects of the king of *England*, became citizens, at the revolution, in 1776; and by the 35th article of the constitution, which makes all persons, born after, citizens. The *Indians* resisted the same sovereign, changed their allegiance at the same time, and became citizens with us. The only distinction in regard to them, was between those who joined the *forces of the state, and those who joined the royal army, in the revolutionary war. The honor of the government demands, that those *Indians* who fought in the ranks of our army, and assisted in securing our independence, should be admitted to all the rights of citizenship. If the father was a citizen, his son, also, born in this state, must be a citizen. (*Co. Litt.* 128. b. 129. a. 7 *Co.* 18. a. *Viner's Abr.* tit. *Alien.* 9 *Mass. Rep.* 377. 454.) The common law doctrine, that an alien cannot take by descent, applies only to persons who are aliens in every sense. It is a doctrine of the common law, (1 *Black. Com.* 371.) that an *alien* cannot purchase land; but does this apply to a grant or patent of land from the government, as a reward for public services? It is owing allegiance to some other sovereign that characterizes an *alien*. By *obedience* is meant, not *actual* obedience, but that which is due from the citizen or subject. (1 *Black. Com.* 373. *Calvin's case*, 7 *Co.*) Would the *Roman* senate have listened to an argument, that a barbarian warrior,

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enrolled in one of their legions, was not a citizen? In *Virginia*, an act was passed, prohibiting *Indians* from holding civil offices. (3 *Hen. & Munf. Statutes*, 250, 251.) This shows, that they were not considered as aliens. The constitution of the *United States*, in apportioning the representatives of the *people*, excludes *Indians* not taxed. If taxed, they would be citizens, or a portion of the sovereign people. If *Indians* are *aliens*, whence is derived the legislative authority to annul contracts with them? By the act of April 4, 1801, (sess. 24. ch. 97. 1 *K. and R. L.* 464.) the *Brothertown Indians* were authorized to hold town meetings, and elect town officers. The doctrine of estoppel applies to acts of government. (10 *Mass. Rep.* 155.) Is not our government estopped, by their own acts, from denying the rights of citizenship to *Indians* when claimed by them?

2. *William*, the son of the *Indian* patentee, was, also, competent to convey to the lessor of the plaintiff; and, as no constitutional or legislative provision existed, at the execution of his deed, to restrain individual *Indians* from selling and conveying their private property, or directing any particular mode of conveyance, different from that used in *ordinary cases, the deed was valid and operative. But it is said, that an *Indian* has no right to aliene his land, by the 37th article of the constitution. The preamble to the act of the 18th of *March*, 1788, states, most explicitly, its object, which was to prevent violations of the 37th article of the constitution, which applies only to *native* titles, held by *Indian* tribes, as communities or nations. Its object was, to guard against the animosities of the tribes, not of individual *Indians*. At that time, there was not, in fact, any individual *Indian* title. The legislature, in passing the act of 1788, did not mean to go beyond the article of the constitution. The great object of the framers of the constitution, and of the legislature, was, to prevent the purchase of the *native Indian right* to lands in the state. The counsel for the plaintiff have not cited a single instance of an individual *Indian* title, prior to 1788. That act was passed to enforce the provisions of the constitution, not to make a new rule. Titles of acts, as well as preambles, are to be taken into consideration, in construing statutes. (*Plowd.* 205. 231. 369. *Co. Litt.* 79. a, 5 *Johns. Rep.* 333, 334. 12 *Johns. Rep.* 175, 176.) Individual *Indians* had, in early times, as chiefs, or heads of tribes, aliened the lands of the tribes, and the act of 1788 was intended to reach cases of that sort. The act of congress, regulating trade and intercourse with *Indian* tribes, passed *March* 30, 1802, (*Cong.* 7. sess. 1. ch. 273. s. 12. *Laws of U. S.* Vol. 3. p. 463.) which has the words "*Indian*, or nation, or tribe of *Indians*," confirms this construction. The Supreme Court, in the cases of *Jackson v. Sharp*, (14 *Johns. Rep.* 472.) and in *Jackson v. Brown*, (15 *Johns. Rep.* 265.) decided, after full discussion and examination of the question, that an individual *Indian*, seised of lands, might aliene them. The surveyor-general has since been governed by those decisions; and has not thought it requisite to give his approbation of such deeds. The act of 1790, prohibiting contracts with *Indians*, or suits against them, admits the validity of antecedent contracts with them, and that

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they might sue and be sued, like other citizens. The act does not proceed on the ground of any civil incapacity to contract; but, in order to preserve peace, it takes from the *Indian* the power of contracting, while he *resides with his tribe. A conveyance from a *feme covert*, duly acknowledged, is sufficient to pass her estate; but no action can be maintained against her, upon the covenants contained in the deed. (15 *Johns. Rep.* 487. 17 *Johns. Rep.* 168.) The situation of an *Indian* owner of land, under the act of 1790, is similar. The deed, or covenant, is in full force, but the remedy is suspended; and whenever the *Indian* abandons his tribe, he may be sued. But if legislative consent were necessary to the validity of the conveyance, we contend that such consent has been given. By "the act concerning tenures," passed February 20, 1787, (sess. 10. ch. 36. s. 1.) it is enacted, "That it shall forever hereafter be lawful for every freeholder to give, sell, or aliene the lands or tenements whereof he or she is, or at any time shall be, seised in fee simple," &c. The act is general and unqualified; it contains no exception as to *Indians*. The tenure of all lands granted by the state, is purely *allodial*, not feudal. Estates, thus granted, cannot be abridged by any subsequent acts of the legislature; surely not by construction. The patent, in this case, was issued to the grantee, for his services, as a soldier, in the line of this state, during the revolutionary war. The grant is to him, his heirs and assigns. The act of April 6, 1790, (sess. 13. ch. 59. 2 *Greenl. ed. Laws*, 332.) "to carry into effect the concurrent resolutions and acts of the legislature, for granting certain lands, promised to be given as bounty lands," was a legislative grant to every patentee, of the unrestrained power of alienation. Whenever it was intended, that the *Indian* grantee should not aliene, the restriction was incorporated in the grant itself. (*Act of 8th of April*, 1802, sess. 25. ch. 112. s. 10. *Grant to Lewis Denny, and other Oneida Indians*.) The grantees themselves, but not their heirs, are prohibited from aliening the lands granted to them. The plain inference from this statute is, that those *Indians* have a right to sell, if not expressly prohibited by statute. In 1788, the *Oneida* and other tribes of *Indians* ceded all their lands to this state; certain portions of which were, however, reserved to the *Indians* with the restriction not to sell, though they might lease them. (*Laws of U. S.* Vol. 1. p. 315. 322.) Many patents were granted to aliens for military *services, and their power to aliene their lands was never questioned.

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Van Vechten, in reply, said, that it was conceded by the Supreme Court, and by the counsel for the defendant in error, that the *Indian* tribes were not, formerly, or at all times, subjects or citizens. It is incumbent on them, then, to show the time when, and the act by which, they surrendered their independence, and became citizens. Conquest, or voluntary submission, are the only modes by which a sovereign nation can surrender its independence, and become incorporated with another nation or sovereignty. (*Vattel*, B. 1. ch. 16. s. 192, 193, 194.) The *chief justice* says the condition of these tribes "has been gradually changing, until they

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have lost every attribute of sovereignty, and become entirely dependent upon, and subject to our government." But this is contrary to the doctrine of *Vattel*. That writer observes, that "natives are those born in the country of parents who are citizens." "That, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a stranger, it will be only the place of his birth, not of his country." "Inhabitants, as distinguished from citizens, are strangers who are permitted to settle and stay in the country." "They enjoy only the advantages which the laws or custom gives them." "The perpetual inhabitants are those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united, and subject to the society, without participating in all its advantages. The children follow the condition of their fathers." (B. 1. ch. 19. s. 212, 213.) The persons here described are not citizens; their situation is as much *sui generis*, as that of the *Indian* tribes in this state. The *Indian* lessor, in this case, was born in the bosom of his tribe, and within the domain reserved to them, or ceded to them as a nation, by our government. Though known to reside within our jurisdiction, they have always been treated by the *United States* as nations. The authority we exercise over them, as to punishing for crimes, &c., is no more than what is exercised over other aliens residing among us, *and who are subject to our laws. The late act of the legislature, (sess. 45. ch. 204.) relative to the *Indian* called *Tommy Jemmy*, asserting the jurisdiction of the state, was unnecessary, if he was a citizen. The criminal jurisdiction of the state, over all persons residing within its territory, was undoubted; and such a jurisdiction is perfectly consistent with those unequal alliances formed by these tribes who have placed themselves under our protection. (*Grotius*, B. 1. ch. 3. s. 21, 22, 23. *Vattel*, B. 1. ch. 1.) The state has done many humane and benevolent acts towards these *Indians*, to protect them from the consequences of their ignorance and incapacity. Nothing is to be inferred from their being occasionally called subjects, in the records of the colonial government, as the numerous public acts and treaties with them repel every idea of their being subjects or citizens. The *Oneida Indians* did not, as a tribe, join our army in the revolutionary war, but only a portion of their warriors. A patent, or grant of land from the state, does not make the grantee a citizen, or confer the rights of citizenship. Congress alone can make citizens. The act relative to *tenures* does not touch the question of citizenship.

It is said, that the state is estopped by its own acts from denying to these *Indians* the rights and privileges of citizenship. But estoppels are mutual; and the *Indians*, by continuing to assert their independence, as distinct tribes or nations, as they do on all occasions, are estopped from claiming all the rights of citizens. There is, then, estoppel against estoppel, and the matter remains at large. The heirs of *Hessians*, and other foreigners who served as soldiers in the revolutionary army, cannot take lands by descent; the law of *escheat* is in continual operation against them. The 37th article of the constitution, and the various acts of the legislature which

have been passed on the subject, are perfectly nugatory and absurd, on the principle that these *Indians* are citizens; but are proper, intelligible and consistent, on the idea of their being aliens. Aliens can purchase and sell land, and their title is good as against all the world, except the state. (5 *Co. Litt.* 53. *Plowd.* 230. 1 *Johns. Cases*, 399. 3 *Johns. Cases*, 109. 112, 113. 335.) In the case of *Jackson v. Sharp*, (14 *Johns. *Rep.* 472.) the question, as to the right of the heir of an *Indian* patentee to convey, did not arise, as the chief justice, in *Jackson v. Brown*, (15 *Johns. Rep.* 264.) seemed to suppose.

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THE CHANCELLOR. Two questions have been made and discussed in this case:—

(1.) Whether *William*, the only lawful issue of *John Sagoharase*, the *Oneida Indian*, was competent to take, and hold as heir, the lands in question, which had been granted to his father by the patent of the 12th of *July*, 1792.

(2.) Whether *Peter Smith* acquired a lawful title to those lands by the deed from *William*, the heir, in the year 1797.

1. The patent is stated to have issued in pursuance of the act of the legislature of the 6th of *April*, 1790, and it grants the lands, in the usual form, to Lieutenant *John Sagoharase*, “his heirs and assigns, as a good and indefeasible estate of inheritance, forever.” It is stated, in the special verdict, that this *John Sagoharase* was an *Oneida Indian*, and a lieutenant in a company of *Indians* in the army of the *United States*, in the line of this state, in the revolutionary war.

I think it might have admitted of a question whether the patent to *Sagoharase* was not issued unadvisedly by the commissioners of the land office, and without authority of law. The act under which it issued, directed the commissioners to issue letters patent to persons entitled to lands by virtue of the concurrent resolutions of the senate and assembly, of the 27th of *March*, 1783, and by virtue of the 11th section of the act of the 11th of *May*, 1784. To determine who were entitled, it was necessary to recur to those resolutions, and to that eleventh section. The concurrent resolution of the 27th of *March*, 1783, declared, that “the legislature would provide that the generals then serving in the line of the army of the *United States*, and being citizens of this state, and the officers and privates of the two regiments of infantry commanded by Colonels *Van Schaick* and *Van Cortlandt*, and the officers of Colonel *Lamb*’s regiment of artillery, who were inhabitants of this state, and the privates thereof, and all officers deranged by the act of congress *of 16th of *September*, 1776, and all officers recommended by congress as persons whose depreciation or pay ought to be made good by this state, and who may hold military commissions in the line of the army at the close of the war,” should receive a bounty of lands according to a ratio there prescribed, and by which a lieutenant was to receive 1000 acres.

Lieutenant *Sagoharase* did not come within the terms of this concurrent resolution. He was not an officer in *Van Schaick*’s or *Van Cortlandt*’s regiment of infantry, or Colonel *Lamb*’s regi-

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ment of artillery. That, I apprehend, cannot be pretended. A company of *Indians* certainly formed no part of either of those three regiments, and were never known or returned as such. Nor was he a deranged officer under the resolution of congress of the 16th of *September*, 1776, as is evident from the face of that resolution. And there is as little ground to infer, that he was one of the officers recommended by congress as persons whose depreciation or pay ought to be made good by this state. That provision was also expressly confined to those officers who held military commissions in the line of the army, *at the close of the war*, whereas, *Sagoharase* died before the 27th of *March*, 1783.

He was, therefore, not embraced by the terms of the concurrent resolution of *March*, 1783; and the eleventh section of the act of the 11th of *May*, 1784, was confined to the officers and soldiers of Colonel *Lamb's* regiment of artillery. The patent was issued according to the terms of it, under the authority of the act of the 6th of *April*, 1790, yet that act confined the bounty to those officers and soldiers which have been specified, and *Sagoharase* did not come within the description. Upon what legal authority was this patent issued? By the acts of the 11th of *May*, 1784, and of the 6th of *April*, 1790, the commissioners of the land office were to *decide* who were entitled to lands under the concurrent resolution; and by the latter act, they were to examine the claims of the officers and soldiers who were returned as the quota of this state, and those of them who received the depreciation of their pay from this state, were to be entitled to the gratuity and bounty lands. This last provision *does not help the patent, for a company of *Indians* never could have been returned as part of the quota of this state.

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I have not been able, then, to discover the legislative authority for this patent. But the commissioners of the land office did decide, that *Sagoharase* was entitled to a portion of the bounty lands as a lieutenant, and we ought now to acquiesce in the authority of that decision. They gave him a patent, not for 1,000, but for 1,200 acres; and it is now too late, and certainly this is not the occasion, to call in question the validity of the patent. The legislature, by the act of the 7th of *March*, 1809, made for the relief of the heirs of the *Oneida Indians*, to whom lands had been granted, assume those grants to be valid. The decision of the commissioners of the land office must now be taken to have been correctly made; and owing to the numerous and complex provisions in the early laws of this state on the subject of military grants, it is very possible there may have been some further, or other authority for these *Indian* patents, which I have not discovered.

The patent was granted in 1792, and the patentee was dead before the 27th of *March*, 1783. But the act of 1790, to which I have already referred, provided that the patents should issue in the names of the persons who had actually served in the line of the army of the *United States*, as designated in the concurrent resolutions, and that the lands should be deemed to have vested in the grantees and their heirs, on the 27th of *March*, 1783. This provision, however, was not sufficient for a case like the present.

for here the patentee was dead on the 27th of *March*, 1783 ; and had it not been for the subsequent act of the 5th of *April*, 1803, I should have considered the patent as null and void, because the act of 1790 could not, by any just construction, be considered as authorizing grants, when the patentee was not alive in *March*, 1783, the period to which the patent was to have relation. But the act of 1803 removed this objection to patents made to persons who were dead in 1783, by declaring that patents to officers and soldiers serving in the line of this state, in the army of the *United States*, in the revolutionary war, and who died *previous* to the 27th of *March*, *1783, vested in those persons, at the time of their deaths, respectively.

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We have now arrived at this conclusion, and which, in the further progress of this decision, I shall assume to be a just and true one, that the patent to *Sagoharase* was duly issued by authority of the legislature, and vested in him, his heirs and assigns, a good and indefeasible estate of inheritance in the premises in question, at the time of his death, which was prior to *March*, 1783. The important question now occurs, What heirs of *John Sagoharase* were intended by the grant? He was an *Oneida Indian*, and lieutenant of a company of *Indians*, and died in the war. The patent was, in effect, a grant to his heirs, though taken in his name, for he had been dead at least ten years when the patent issued. Could the government of this state have meant any other than *Indian* heirs? It was not to be supposed that he had, or could possibly have had any other heirs ; and if the grant was not intended for his *Indian* heirs, it was a void and an absurd grant. He was dead, and could not take ; and if his son *William*, his only lawful issue, could not take as heir, who could take? Clearly, no person ; and can we believe, that a specific grant of land in fee, made by due authority of government, to an individual *Indian* by name, was intended to be illusory, and to mean nothing? The government acted with knowledge and discretion on the occasion ; they knew the character of the grantee, and they knew the services he had rendered. The honor and good faith of the state would seem to require, that the grant should have a real and effectual operation, and be deemed to enure to the benefit of *William*, the only lawful issue of the patentee, notwithstanding he belonged to the *Oneida* tribe of *Indians*, as his father had before him. Whether the *Oneida Indians* are to be regarded as aliens or citizens, as a tribe, with some fragments of their ancient independence, or as completely subjugated, broken down, and merged in the great body of our people, appears to me to be quite immaterial in reference to the title of this heir. The government must have intended that the *Indian* heir should take, and the grant is not susceptible of any other reasonable construction. It was no matter, then, in what *civil or political relation the *Indian* heir stood in respect to the whites ; he still took *as heir*, because the government was competent to vest him with that capacity, and the intention to do it is implied in the grant itself, which was issued by authority of law. This conclusion appears to me too clear to be a mistaken one ; and I would here observe, that a patent issued from the land office, in pursuance of

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a statute, is equivalent, in force and effect, to a legislative grant, directly to the individual. Now, it is understood to be a general rule, that when an alien is allowed specially by statute, to take and hold lands to him and *his heirs*, (and such statutes have been passed at almost every session since the revolution,) he has of course a capacity to transmit by inheritance, to his alien offspring, and they have equally a capacity to take. When the legislature speak without restriction or qualification of the heirs of an alien, they must mean such heirs as he was then competent to have; and it would be a reproach to the good sense, or to the good faith of the legislature, to suppose they could have any other meaning. It was formerly very common to provide in these special statutes, allowing aliens by name to hold lands in fee, that the alien purchaser should not sell or assign, except to a citizen; but there never was an instance of a proviso that his heirs should not take the inheritance after him except they were citizens. There is a wide and a most material difference between the right to sell to an alien stranger, and the right to transmit by descent to the alien heir. The former is a free and voluntary act, resting on contract, and can readily be dispensed with, without inconvenience; but the latter right is a part of the law of our nature, and deeply rooted in the social affections. Even those prohibitions against selling to aliens were unnecessary, and have latterly been omitted as useless, for without such a proviso the alien purchaser could not convey his land to another alien, so as to vest him with a sure and indefeasible estate; for our own native citizens have not that power.

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The permission, then, by law, to an alien, to take and hold lands to him and his heirs, or a grant from government by authority of law, to an alien and his heirs, does necessarily imply, that he may transmit by descent to his children, or *other alien heirs, and that his heirs may take the land in question equally as if they were natural born citizens. No alien, in his right mind, would purchase upon any other construction; many of them must have no expectation of having any other than alien heirs. It would be painful for them to await the arrival of the period of naturalization, and the uncertainty of acquiring a new race of natural born or naturalized descendants. They may be too advanced in life to expect it, or they may be suddenly cut off in the midst of their expectations. And permit me to ask, Where would be the benevolence, or the magnanimity, or the justice, or the good faith of government, if it should so far deal with an alien as to permit him to purchase lands to himself, and his heirs, or to make (as in the present case) a gratuitous grant of lands to him and his heirs, to-day, and then, on the morrow, to snatch it from his orphan son, under the pretence that he was an alien? Such a privilege would be, in truth, no privilege. It would be a heartless and a fraudulent grant, with the deadly power of *escheat* concealed in its enclosure.

But the act of the 7th of *March*, 1809, removed all scruples on this point, by declaring, that the heirs of each of the *Indians* to whom land had been granted by this state, for military services in the war between the *United States* and *Great Britain*, should be, and were made capable of taking and holding any such lands by

descent, in the same manner as if such heirs were citizens of this state at the death of their ancestor. This provision, as I construe it, was nothing more than declaratory of what was already the rule on that subject, because it seems impossible to maintain, upon any sound principles of construction, that the heirs of the *Indian* patentee, being *Indians*, would not have taken by descent without this act. The treaty between the *United States* and *Great Britain*, in 1794, contained a similar declaratory provision, that *British* subjects, and *American* citizens, who then held lands in the dominions of either power, might sell and devise them as if they were natives; and that neither they, nor *their heirs* or assigns, should, so far as respected those lands, be regarded as aliens. This treaty was only a publication of the existing law of each *country, as far as the heirs of persons then lawfully seised were concerned; but it went further than the law would have gone without the article, for it allowed the owners of the land not only to transmit by descent to their alien heirs, but even to sell or devise to aliens.

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In the view which I have thus taken of the case, the question discussed in the Supreme Court, and which has occupied a large share of the attention of the counsel in the argument before this court, does not appear to be of any consequence in the decision of the cause. "The question," says the chief justice, in the opinion which he delivered, "is simply, whether a legitimate child of an *Indian*, holding property by grant from the state, to him individually, is to be regarded as his heir, so far as to take by inheritance; and this," he says, "involves the inquiry, whether an *Oneida Indian* is to be considered a citizen of the state, or an alien." He then enters into a train of argument, to show, that the *Indians* within this state are, in contemplation of law, citizens, and not aliens; and upon that fact he concludes, that *William Sagoharase* took the lot in question by descent, as heir to his father *John*. Now, with great respect for the opinion of the Supreme Court, I beg leave to observe, that the question whether *William* was competent to take the lot as heir, does not depend upon the character of *William* as an alien or citizen, *for be he which he may*, the grant from the government to *John*, and his heirs, of necessity, and upon the established principles and usages of law, included the *Indian* son, who was his only lawful issue.

But as the court below, and the counsel upon the argument here, have thought it material to discuss the question, whether *William*, the *Indian* heir, was to be regarded as an alien or a citizen, on the death of his father, I ought, very properly, to distrust the correctness of my own views upon that subject, and pay some attention to their learned investigations.

The *Oneidas*, and the other tribes composing the six nations of *Indians*, were, originally, free and independent nations. It is for the counsel, who contend that they have now ceased to be a distinct people, and become completely incorporated with us, and clothed with all the rights, and *bound to all the duties of citizens, to point out the precise time when that event took place. I have not been able to designate the period, or to discover the requisite evidence of such an entire and total revolution. Do our laws,

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even at this day, allow these *Indians* to participate equally with us in our civil and political privileges? Do they vote at our elections or are they represented in our legislature, or have they any concern, as jurors or magistrates, in the administration of justice? Are they, on the other hand, charged with the duties and burthens of citizens? Do they pay taxes, or serve in the militia, or are they required to take a share in any of the details of our local institutions? Do we interfere with the disposition, or descent, or tenure of their property, as between themselves? Do we prove their wills, or grant letters of administration upon their intestate's estates? Do our *Sunday* laws, our school laws, our poor laws, our laws concerning infants and apprentices, or concerning idiots, lunatics, or habitual drunkards, apply to them? Are they subject to our laws, or the laws of the *United States*, against high treason; and do we treat and punish them as traitors, instead of public enemies, when they make war upon us? Are they subject to our laws of marriage and divorce, and would we sustain a criminal prosecution for bigamy, if they should change their wives or husbands, at their own pleasure, and according to their own customs, and contract new matrimonial alliances? I apprehend, that every one of these questions must be answered in the negative, and that, on all these points, they are regarded as dependent allies and alien communities. It was, therefore, with some degree of surprise, that I observed the Supreme Court laying down the doctrine in this case, that these *Indians* of the six nations were "as completely the subjects of our laws as any of our own citizens." In my view of the subject, they have never been regarded as citizens or members of our body politic, within the contemplation of the constitution. They have always been, and are still considered by our laws as dependent tribes, governed by their own usages and chiefs, but placed under our protection, and subject to our coercion, so far as the public safety required it, and no further.

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*The five nations once formed the fiercest and most formidable confederacy of *Indian* republics ever known in *North America*; and, by their prowess and enterprise, they held distant tribes of *Indians* under dominion and tribute. But after the settlement of the colony, and their communication with the whites, they began to degenerate, and to descend by gradual but perceptible degrees, from their original elevation. Ever since the war of 1756, their fall has been more precipitate, and with a more sensible diminution of their population, power and territory, as well as of their pride and glory. The whites have been pressing upon them as they kept receding from the approaches of civilization. We have, at length, intruded our influence into their domestic concerns. We have purchased the greater part of their lands, destroyed their hunting grounds, subdued the wilderness around them, overwhelmed them with our population, and gradually abridged their native independence. Still, however, they are permitted to exist as distinct nations, and we continue to treat with their sachems in a national capacity, and as being the lawful representatives of their tribes. Through the whole series of our colonial history, these *Indians* were considered as dependent allies, who advanced fo

themselves the proud claim of free nations, but who had voluntarily, and upon honorable terms, placed themselves and their lands under the protection of the *British* government. The colonial authorities uniformly negotiated with them, and made and observed treaties with them, as sovereign communities, exercising the right of free deliberation and action; but, in consideration of protection, owing a qualified subjection, in a national, but not in any individual capacity, to the *British* crown.

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No argument can be drawn against the sovereignty of these *Indian* nations, from the fact of their having put themselves and their lands under *British* protection. Such a fact is of frequent occurrence in the transactions between independent nations.

One community may be bound to another by a very unequal alliance, and still be a sovereign state. Though a weak state, in order to provide for its safety, should place itself under the protection of a more powerful one, yet, according *to *Vattel*, (B. 1. ch. 1. s. 5 and 6.) if it reserves to itself the right of governing its own body, it ought to be considered as an independent state. There are several kinds of submission, says this same jurist. (B. 1. ch. 16. s. 194.) The submission may leave the inferior nation a part of the sovereignty, restraining it only in certain respects, or it may totally abolish it, or the lesser may be incorporated with the greater power, so as to form one single state, in which all the citizens will have equal privileges. Now, it is very apparent, from our whole history, that the submission of the six nations has been of the former kind, and that, as an inferior nation, they were only restrained of their sovereignty in certain respects. Though born within our territorial limits, the *Indians* are considered as born under the dominion of their tribes. They are not our subjects, born within the purview of the law, because they are not born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities. In this situation we stood in relation to each other, at the commencement of our revolution. The *American* congress held a treaty with the six nations, in *August*, 1775, in the name and on behalf of the United Colonies, and a convention of neutrality was made between them: "This is a family quarrel between us and old *England*," said the agents, in the name of the colonies; "you *Indians* are not concerned in it. We desire you to remain at home, and not join either side." Again, in 1776, congress tendered protection and friendship to the *Indians*, and resolved, that no *Indians* should be employed as soldiers in the armies of the *United States*, before the tribe, to which they belonged, should, in a national council, have consented thereunto, nor then, without the express approbation of congress. What acts of government could more clearly and strongly designate these *Indians* as totally detached from our bodies politic, and as separate and independent communities?

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In 1778, congress resolved, that they would chastise the *Senecas*, who had joined the enemy, and would reduce them to terms of peace; and when some *Seneca* chiefs appeared *at *Philadelphia*, they directed the board of war to inquire, whether they came in

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the character of representatives or ambassadors of their nation. And when, in 1779, congress had resolved upon terms of peace with the *Indians*, the conditions were such as would be dictated to a public enemy, known as such by the laws of war; they had not the remotest resemblance to the terms or spirit of a negotiation with citizens or subjects who had broken their allegiance. In 1783, congress expressly waived the right of conquest over the *Indians*, and recommended proffers of peace and a friendly treaty, for the purpose of receiving them into favor and protection. Lastly, in *October*, 1784, a treaty of peace was made at *Fort Stanwix*, between the *United States* and the sachems and warriors of the six nations; and the *United States* gave peace to those of the six nations who had been hostile, and received them under protection, and required that the hostile tribes should stipulate, that the *Oneidas* and *Tuscaroras* should be secured in the possession of their lands.

There was nothing, then, in any act or proceeding, on the part of the *United States*, during the revolutionary war, which went to impair, and much less to extinguish, the national character of the six nations, and consolidate them with our own people. Every public document speaks a different language, and admits their distinct existence and competence as nations, but placed in the same state of dependence, and calling for the same protection which existed before the war.

The report of a committee of congress, in *May*, 1782,* placed the condition of these six nations upon the true foundation, in point of fact. It appeared, they said, that all the lands of the six nations had been by them, as appendant to the government of *New-York*, in due form, placed under the protection of the crown of *England*, so far as respected jurisdiction only; and that the colony of *New-York*, for upwards of one hundred years, had protected these nations as the dependents and allies of that government.

In 1794, there was another treaty made between the *United States* and the six nations, in which perpetual peace and friendship were declared between the contracting parties, *and the *United States* acknowledged the lands reserved to the *Oneida*, *Onondaga* and *Cayuga* nations, in and by their treaties with this state, to be their property; and the treaty contains this provision, which has a very important and a very decisive bearing upon the point under discussion: The *United States* and the six nations agree, that for injuries done by individuals on either side, no private retaliation shall take place, but complaint shall be made by the injured party to the other; that is, by the six nations, or any of them, to the president of the *United States*, and by or on behalf of the president, to the principal chiefs of the six nations, or of the nation to which the offender belongs. What more demonstrable proof can we require, of existing and acknowledged sovereignty residing in those *Indians*? We have here the forms and requisitions peculiar to the intercourse between friendly and independent states, and they are conformable to the received institutes of the law of nations. The *United States* have never dealt

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with those people, within our national limits, as if they were extinguished sovereignties. They have constantly treated with them as dependent nations, governed by their own usages, and possessing governments competent to make and to maintain treaties. They have considered them as public enemies in war, and allied friends in peace. If mere territorial jurisdiction would make the six nations citizens of this state, the same effect must have been produced as to the numerous tribes of *Indians* included within the vast territorial limits of the *United States*; and it is worth a moment's attention to observe the relations existing between the *United States* and the *Indians*, to the south and to the west.

In the treaty between the *United States* and the *Wiandots*, *Ottawas*, *Chippewas*, and others, in 1785, it was provided, that if any *Indian* commit murder or robbery upon a citizen of the *United States*, they shall deliver him up to be punished according to our law. This surrender of criminals is here made part of a national compact, and the distinction is preserved between *Indians* and citizens; and, while we assume the right to redress the injuries of the one, we abandon the other to the protection of their own people. The treaties with the *Cherokees*, in 1785 and 1791, go further, *and provide, that citizens of the *United States* committing robbery or murder on the *Cherokees*, shall be punished by us in like manner as if the same were committed upon one of our own citizens. They also contain a new and striking provision, and that is, that citizens settling upon their lands, thereby *forfeit the protection of the United States*, and the *Cherokees* may punish them as they please. The same provision, relative to the surrender and punishment of persons guilty of murder or robbery, is inserted in the treaties with the *Choctaws*, *Chickasaws*, *Shawanese*, *Creeks*, *Ottawas*, *Chippewas*, &c. And, in the treaties with the latter tribes, in 1789 and 1795, citizens settling on their lands are declared to be out of the protection of the *United States*, and liable to punishment at the discretion of the *Indians*.

It would seem to me to be almost idle to contend, in the face of such provisions, that these *Indians* were citizens or subjects of the *United States*, and not alien and sovereign tribes.

In the ordinance of congress, in 1787, passed for the government of the territory of the *United States* north-west of the *Ohio*, it was declared, that the *Indians* within that territory should never be invaded or disturbed in their property, rights or liberties, unless *in just and lawful war*. By a just and lawful war is here meant, a controversy according to the public law of nations, between independent states, and not an insurrection and rebellion. The *United States* have never undertaken to negotiate with the *Indian* tribes, except in their national character. They have always asserted their claims against them in the only two ways known to nations, upon the ground of stipulation by treaty, or by force of arms. The ordinance further provided, that laws should be made to prevent wrongs done to the *Indians*; and this implies a state of dependence and imbecility on the part of the *Indians*, and that correspondent claim upon us for protection arising out of the

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superiority of our condition, which afford the true solution to most of our regulations concerning them.

We are now prepared again to put the question, where is the evidence of the fact, or where is the ground for *the assertion, that, at the death of *John Sagoharase*, as early as *March, 1783*, the *Oneida* tribe of *Indians* had ceased to be a nation, and had become an integral part of the people of this state, in whose name and by whose authority the constitution was ordained? No proposition would seem to me to be more utterly fallacious, and more entirely destitute of any real foundation in historical truth. It is repugnant to all the treaties, and to all the public documents, to the declared sense and practice of the colonial governments, and of the government of the *United States*, and of this state. The question is not, what changes the six nations, or the *Oneidas* in particular, have undergone since 1783; but the question is, were the *Indians* belonging to the tribe of *Oneidas*, and residing with the *Oneidas*, in 1783, when *John Sagoharase* died, citizens of this state, and capable of purchasing, holding and inheriting freehold estates, in the character of citizens, with all the appendant rights? In my opinion, if the grant to *John*, the father, did not, of itself, authorize *William*, the son, to inherit as heir, he had no capacity to take, for he was an alien, placed under our protection, as one of the members of his tribe, but not owing us personal obedience and allegiance as a subject. If the patent did not exclusively render him competent to inherit as heir, then he had no such ability until the act of 1809, which declared that the heirs of *Oneida* patentees should be competent to take, "in the same manner as if such heirs were citizens of this state at the death of their ancestors;" and this act was not passed until two years subsequent to the deed to *Peter Smith*.

But though it be immaterial, as to the point under discussion, what became of the *Oneida* nation since the death of *John*, the patentee, yet, in the opinion of the Supreme Court, much stress appears to have been laid upon the act of the 12th of *April, 1822*, pardoning *Tommy Jemmy*, and asserting exclusive criminal jurisdiction in the courts of this, and the *United States*, over all crimes and offences committed within the state. Admitting that this act completely annihilated the national character, and the sovereign attributes of the six nations, what has this fact to do with the inquiry, how those nations stood, forty years ago, *when *John Sagoharase* died, and when his son is asserted to have succeeded as heir? Though this act may have gone a step beyond any former proceeding, in respect to *Indian* sovereignty, yet it only restrained the exercise of it in one particular mode, and claimed that jurisdiction over our own territory, which is perfectly consistent with the admission of the alienage, and distinct national character of the *Indians*. It is understood that witchcraft is the only offence which the *Indians* have undertaken to punish judicially, as a community. It was a sentence for that offence that led to the act for which *Tommy Jemmy* was tried. All other offences are said to be left to the arm of private and family revenge; and their irregular and foul executions were shocking to humanity, and were not to be toler-

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ated in the neighborhood, and under the eye of a civilized and Christian people. Under the circumstances in which we were placed in relation to those *Indians*, as their guardians and protectors, we had a right to avail ourselves of the superiority of our character, and put a stop to such irregular and horrible punishments, even as our nation claims the right of punishing the subjects of other independent powers, without the consent, and against the will of their own governments, if they are caught in carrying on the *African* slave trade.

I do not, therefore, consider the act of 1822 as affecting the question, whether the remainder of the six nations still rightfully exist as a separate people, or whether they have become amalgamated with us, and incorporated into the body politic, as members and citizens. In my opinion, that statute had no such intention; and when the time shall arrive for us to break down the partition wall between us and them, and to annihilate the political existence of the *Indians* as nations and tribes, I trust we shall act fairly and explicitly, and endeavor to effect it with the full knowledge and assent of the *Indians* themselves, and with the most scrupulous regard to their weaknesses and prejudices, and with the entire approbation of the government of the *United States*. I am satisfied, that such a course would be required by prudence, and would become necessary, not only for conscience sake, but for the reputation of our justice.

*So late as the 5th of *April*, 1813, the legislature authorized the governor to hold a treaty, on the part of the people of this state, with the *Oneida* nation of *Indians*, and with any other *Indian* nations or tribes within this state. And here let us observe who were to be the contracting parties to this treaty, by the very words of the statute. They are *the people of this state* on the one part, and the *Oneida nation* on the other. What language can be more unequivocal to show, that the *Oneida* nation was then subsisting as a distinct community, recognized in a national character, and as competent to treat in that character, and that they did not form an integral part of the people of this state? Indeed, so clear does this point appear to my judgment, that if it were not for the great authority of the opinion which we are reviewing, and for the able argument which we have heard, I should suppose that I had been combating a shadow.

If, therefore, the case turned upon the question, whether *William*, the *Indian* heir, was a citizen or an alien in 1783, I should not be in favor of the conclusion drawn by the Supreme Court. But I do not place the cause upon that ground, for the reasons which have already been mentioned. I take it, as a given point, that the patent issued according to the direction, and under the authority of the statute mentioned in it, because such had been the decision of the commissioners of the land office, and because the legislature, afterwards, held such patents to be valid; and then, I say, that the grant to *John Sagoharase*, and his heirs, rendered the *Indian* heir competent to take, though an alien, and his title was not liable to be impeached on account of his civil or political condition.

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If *William* took the estate as heir, then the next, and only remaining head of inquiry, is, whether *Peter Smith* was authorized to purchase from *William*, the heir, in the year 1797. The Supreme Court were of opinion, that the purchase by *Smith* was lawful and valid, and that, in 1797, there was no prohibition to purchasers of land from individual *Indians*, but only from *Indians* as a tribe or community. The court, on this point, entered into no discussion, but merely referred to one or more former decisions, as settling the question. Before entering at large into the subject, it may *be useful to state briefly the substance of the various and conflicting decisions of the Supreme Court.

The same questions which we have now before us, arose in the case of *Jackson v. Wood*, which was decided in the Supreme Court, in 1810, (7 *Johns. Rep.* 290.) That was the case of a patent for a military lot, granted in 1791, to an *Oneida Indian*, for his services during the revolutionary war. After the death of the patentee, his two sons, who were *Oneida Indians*, residing with the *Oneida* tribe, sold, in 1808, the lot to the plaintiff, and it was contended, in support of the title of the purchaser, and by one of the counsel who argued this cause, on the part of the defendant in error, that the constitution did not apply to sales by individual *Indians*, and that the act of 1788 was not intended to be broader than the constitution. It was contended, on the other side, that the *Indian* heirs were aliens, and so could not inherit; and also, that the purchase from an individual *Indian* was within the letter and spirit of the act of 1788. I had the honor, at that time, to be chief justice, and delivered, what was admitted to be, the unanimous opinion of the court; the other members of the court were Judges *Thompson*, *Spencer*, *Van Ness* and *Yates*. It was observed, in the opinion delivered, to be a fact, too notorious to admit of discussion, or to require proof, that the *Oneida Indians* still resided within the state, as a distinct and independent tribe, and that they could not be considered as subjects, born under allegiance, and bound, in the common law sense of the term, to all its duties. That the prohibition in the constitution might, perhaps, refer to purchases from the *Indians* as a tribe, but the act of 1788 carried the prohibition to purchases from individual *Indians*, and the act of 1801 prohibited any action upon any contract against any *Indian* residing upon their lands. These statute regulations, it was observed, showed the sense of the legislature, that an *Indian*, in his individual capacity, was, in a great degree, *inops consilii*, and unfit to make contracts, unless with the consent and under the protection of a civil magistrate. It was concluded, that the purchase from the heirs was within the letter and spirit of the acts of 1788 and 1801, and that those statutes ought to be liberally construed *in favor of the inability; and judgment was rendered against the purchaser.

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If that case was well decided, then the judgment of the Supreme Court, in the case before us, is erroneous, for the two decisions are directly repugnant to each other.

Afterwards, in *Chandler v. Edson*, in 1812, (9 *Johns. Rep.* 362,) being the case of an entry upon lands of the *Stockbridge Indians*

the court unanimously observed, (and I was still a member, and wrote the opinion,) that it was the wise policy of the statute of 1801, (being the revised act which included the act of 1788,) to interdict all individual whites from any contract with the *Indians*, in respect to their lands, or any interest therein. Such a complete and total interdict was indispensable to save the *Indians* from falling victims to their own weakness, and to the superior intelligence, and, sometimes, to the cupidity, of the whites.

This decision, and the principle announced in it, was perfectly in accordance with the preceding decision, and showed the strong conviction of the court, as to the extent and policy of the prohibition.

The next case was that of *Dana v. Dana*, in May, 1817, (14 *Johns. Rep.* 181.) in which a suit was brought upon an arbitration bond, against an *Oneida Indian*; I refer to it, not as an analogous case, but as containing an explicit recognition of the former decisions. The object and policy of the statutory inhibition, said Mr. Justice *Spencer*, in delivering the opinion of the court, had been already expounded by the two preceding decisions to which he referred. We considered the statute as a guard against the imposition and frauds to which that unfortunate race of men are exposed, from their ignorance and mental debasement.

Thus far the doctrine of the court had been uniform, and the public had a right to consider the construction of the statutes, so far as that construction depended upon the Supreme Court, as settled. But in the case of *Jackson v. Sharp*, decided in October, 1817, (14 *Johns. Rep.* 472.) a different rule of construction was adopted. The patent, in that case, was granted to an *Oneida Indian*, for a military lot, and in 1791, he sold the lot to a white man, and the question was, whether the conveyance was valid. It was *contended, in favor of the purchase, and by the same counsel who had argued in support of that side, in the first case which has been mentioned, that neither the constitution, nor the act of 1788, related to purchases from an individual *Indian*. It was there said, also, that the court, in *Jackson v. Wood*, admitted, that the constitution related to purchases of *Indians* as a tribe. Now this was not exactly so. The opinion delivered in 1810 was cautious and reserved on that point, and only mentioned, that, *perhaps*, the constitution had such a reference. The opinion of 1810 considered the act of 1788, as extending the prohibition explicitly to all purchases from individual *Indians* as well as from a tribe. The judgment of the court, in the case of *Jackson v. Sharp*, was pronounced by Mr. J. *Yates*; and in the opinion which he delivered in behalf of his brethren, it is said the constitution did not affect the deed, and applied only to purchases from the *Indians* as a community, and that the act of 1788 did not carry the prohibition further than the constitution had carried it, and so the court held the purchase valid.

The court undertook to distinguish the case from that of *Jackson v. Wood*, for they say the decision in 7 *Johns. Rep.* was decided upon the act of 1801, which was more extensive than the act of 1788. This I apprehend to be a mistake. The case of *Jackson*

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v. Wood was decided upon the act of 1788, which was explicitly referred to as reaching the case; and the provision in the act of 1801, prohibiting suits against *Indians* upon contracts, was referred to principally because it afforded auxiliary considerations. It is impossible that I, for one, could ever have considered that the act of 1788, by being incorporated with many other provisions into the body of the act of 1801, was to receive a different and broader construction, because the preamble was laid aside in the revision of it. The preambles to most of the statutes were omitted in the revision of 1801, as unnecessarily encumbering the work, and because they could not very well be inserted when the provisions, in various statutes relating to one subject, were all blended together in one consolidated statute. Besides, it had already been settled, by the unanimous opinion of the *Court of Errors, in 1805, (*Taylor v. Delancey*, 2 *Caines's Cases in Error*, 151.) that even the change of phraseology in the language of a revised act, should not be deemed or construed to be a change of the law as it stood before the revision, unless such phraseology evidently purported an intention in the legislature to work a change. And, surely, after such an authority, the court never could have intended, in 1810, that the act of 1788 was to be more extensively construed as revised in 1801, merely from the unimportant circumstance, that it had lost the preamble, which is no part of a statute.

The decision of 1817, in undertaking to place the case of *Jackson v. Sharp* out of the reach of the decision in *Jackson v. Wood*, proceeded evidently upon a mistake. The two decisions are utterly inconsistent with each other, and the latter did overrule the former, and introduce a new rule of construction. This the court had a right to do, and they were bound to do it, if they had become entirely satisfied, that they had previously mistaken the law. Whether they had mistaken it or not, remains now to be definitively settled by this court. All that I insist upon, at present, is, that when a rule of property has been once deliberately adopted and declared, it ought not to be disturbed by the same court, *except for very cogent reasons*, otherwise, the community would never be able to deal with safety, and would be in a state of perplexing uncertainty as to the law.

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The 37th article of the constitution of 1777 declared it to be "of great importance to the safety of this state, that peace and amity with the *Indians* within the same, be at all times supported and maintained; and that the frauds too often practised towards the *Indians*, in contracts made for their lands, had, in divers instances, been productive of dangerous discontents and animosities." It, therefore, ordained, "that no purchases or contracts for the sale of lands, made with, or of the said *Indians*, shall be binding on them, or deemed valid, unless made under the authority, and with the consent of the legislature." This is the provision; and the constitution states one important fact as the basis, and the sole governing motive for the whole of it, and that is, that *frauds* were too often practised towards the *Indians* in *contracts made for their lands. It was this, and this only, that endangered our peace and amity with them. There was no suggestion of fraud

or imposition committed by them upon the whites. That, indeed, would have been an idle suggestion, and about as reasonable as the complaint of the wolf in the fable, that the lamb, standing far below him, was disturbing him in the enjoyment of the running stream. The constitution assumes, as a fact, one great truth, verified by the whole history of our country, that the *Indians*, in their commercial dealings with the whites, were, comparatively, a feeble and a degraded race, who stood in need of the arm of government constantly thrown around them. Before the constitution of this state had been adopted, the congress of the *United States* had felt and acknowledged *the duty* of protecting the *Indians* from the frauds to which they were exposed, and of which they were too frequently the victims.

Thus, in the resolution of congress of *January*, 1776, regulating trade with the *Indians*, it was declared, that no person should be permitted to trade with them without license, and that the traders should take no unjust advantage of *their distress and intemperance*. In a speech, on behalf of congress, to the six nations, in *April*, 1776, it was said to them, that congress were determined to cultivate peace and friendship with them, and prevent the white people from *wronging them in any manner, or taking their lands*. That congress wished to afford protection to all their brothers the *Indians*, who lived with them on this great island, and that the white people should not be suffered, *by force or fraud, to deprive them of any of their lands*. And in *November*, 1779, when congress were discussing the conditions of peace to be allowed to the six nations, they resolved, that one condition should be, that no land should be sold or ceded *by any of the said Indians*, either *as individuals*, or as a nation, unless by consent of congress.

This resolution, almost coeval with our constitution, shows the important fact, that *individual Indians*, as well as tribes and communities, were, and ought to be, equally protected from imposition in the sale of their lands; and if such were the views of congress in 1779, why should not **the same views* have been in the contemplation of our constitution in 1777?

The government of the *United States* had, in the earliest and purest days of the republic, watched with great anxiety over the property of the *Indians* intrusted to their care. It must have been immaterial from what source the property proceeded, and whether it was owned by tribes, or families, or individuals. *If it was Indian property in land*, it had a right to protection from us as against our own people. The *Indians* under the colony administrations confided their lands to our protection. As early as 1634. the *Onondagas* and *Cayugas*, for instance, told the governor of *New-York*, that they were a free people, and had put their lands and themselves under the protection of the *duke of York*, and of the great sachem *Charles*, that lived on the other side of the great water. The friendship of the six nations towards the colony government, and the protection of the government to them, continued unshaken for upwards of a century, and this mutual good faith has received the most honorable and the most undoubted attestations. Governor *Colden*, in his history of the six nations, states, that the

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Dutch entered into an alliance with them, which continued without any breach on either side, until the *English* conquered the colony in 1664. Friendship and protection were then renewed, and the *Indians*, he says, observed the alliance on their part strictly to his day; and we know that their fidelity continued unshaken down to the period of our revolution. On one occasion, the colonial assembly, in their address to the governor, expressed their abhorrence of the project of reducing the *Indians* by force, and possessing themselves of their lands, for, to the steadiness of these *Indians* to the interest of *Great Britain*, they said, they owed, in a great measure, their internal security. The colony governors constantly acknowledged their friendship and services. We have, on the other hand, in favor of the colony, the report of a committee of congress, to which I have already alluded, "that the colony of *New-York* had borne the burden, both as to blood and treasure, of protecting and supporting the six nations for more than one hundred years, as the dependants and allies of the government."

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*After all this, who will hesitate to say, that it was worthy of the character of our people, enjoying so great a superiority over the *Indians*, in the cultivation of the mind, in the lights of science, the distinctions of property, and the arts of civilized life, to have made the protection of the property of the feeble and dependent remnants of the nations within our limits a fundamental article of the government? It is not less wise than it is just, to give to that article a benign and liberal interpretation, in favor of the beneficial end in view. We ought to bear in mind, when we proceed to the consideration of the subject, that the article was introduced for the benefit and protection of the *Indians*, as well as for our own good, and that we are bound to the performance of it, not only by duty, but by gratitude. The six nations were a great and powerful confederacy, and our ancestors, a feeble colony, settled near the coasts of the ocean, and along the shores of the *Hudson* and the *Mohawk*, when these *Indians* first placed themselves, and their lands, under our protection, and formed a covenant chain of friendship that was to endure for ages. And when we consider the long and distressing wars in which the *Indians* were involved on our account with the *Canadian French*, and the artful means which were used, from time to time, to detach them from our alliance, it must be granted that fidelity has been no where better observed, or maintained with a more intrepid spirit, than by these generous barbarians.

The purchase by *Peter Smith*, in 1797, came within the provision of the constitution. It was a purchase of lands of an *Oneida Indian*, residing with his tribe, and within the limits of this state. It was within the mischief and within the spirit, though not strictly within the very letter of the constitution, because the purchase was not made of the said *Indians*, but only of one of the said *Indians*. This is all the variation between the fact and the letter, which has given rise to a construction, that would withdraw all purchases in detail, made of individual *Indians*, from under the protection of the constitution. The whole article might be frittered away by this means. To construe the 37th article strictly by the

etter would lead to very great absurdities; *yet it is difficult to say why we should adhere to the letter in one part, and not in another part of it. Thus, the prohibition is as to purchases of *the Indians within this state*. Literally, this would apply to the entire body of *Indians* collectively, of every nation and tribe; and we cannot reduce the prohibition from the *Indians* within this state to a part or portion of these *Indians*, without having recourse to a reasonable construction. So, also, upon a literal interpretation, any person might make a single purchase, for the constitution does not say, no purchase or purchases, contract or contracts, but is confined to the plural number, *no purchases or contracts*. But whoever thought of subjecting to such a narrow, grammatical construction, a great constitutional charter, dealing only in general principles and bold outlines, and made for the noblest of moral and political purposes? Frauds are much more likely to happen in contracting with a single, half naked, unsheltered and unprotected *Indian*, than with an assembly of grave chiefs, distinguished not only for valor in war, but for wisdom in council. The constitution might, also, be easily evaded, upon this construction, by procuring a sale from the tribe to the individual, and then a sale from the individual to the whites.

In the plan of a penal code, lately submitted to the legislature of *Louisiana*, by an eminent jurist, and one of the native sons of this state, there is a declaratory article, that when the plural, *persons*, is used in a statute prohibition, the injunction applies to any one person doing the act; and that a prohibition as to *more objects* than one, includes the same prohibition as to a single one of the same objects. According to that rule, then, a prohibition to purchase from the *Indians* includes a prohibition to purchase from any of the *Indians*; and what commentary can make it plainer? Suppose the constitution had said, no fraudulent purchases from the *Indians* should be valid, would it not have reached a fraudulent purchase from a single *Indian*? Suppose it had said, that no robberies or murders should be committed upon the *Indians*, under pain of death, would it not have applied to a single robbery or murder? We ought to give to the words the sense most suitable to the *subject matter, and construe them largely and equitably in favor of the *Indians*, for whose protection they were intended. If the *Oneida* sachems, in council, had brought a complaint to us, that a member of their tribe, residing with them, and highly esteemed by them, had been defrauded by one of our people of his bounty lands, which his father had purchased from us by his blood, and they had pointed to our constitution, and asked if the legislature had authorized the purchase; if we answered in the negative, but justified the purchase, on the ground that the constitution spoke of purchases from *Indians*, and not of a purchase from an *Indian*, would their untutored minds be able to comprehend the nicety of such a distinction, and the subtlety of such an interpretation? Would they not say, or rather would not the world say for them, that we adhered to the letter and disregarded the spirit of the constitution? that we acted almost as unreasonably as the *Roman* general, who concluded a truce with the enemy for

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thirty days, but ravaged their territory in the night, under the pretence that nights were not within the letter of the compact?

The rule for the construction of statutes, when words are used in the plural number, was well laid down by *Hales, J.*, in a case in *Plowden*. (*Partridge v. Strange*, 1 *Plowd.* 86. *b.*) The statute of *Hen. VIII.* against selling pretended titles, spoke of rights and titles in the plural number; that judge said, "A pretended right and title, in the singular number, is within the penalty of the statute, for the plural number contains in itself the singular number, and more." He referred, also, to the statute of 1 *H. V.*, relating to those who forged false deeds and muniments, and observed, "that the statute speaks of false deeds in the plural number, yet, if a man forge one false deed, he shall be punished by the statute, as it is held in many books." Lord *Coke*, in his notes to *Littleton*, (*Co. Litt.* 369. *a.*) lays down the same rule of construction; and where the statute speaks of rights in the plural number, any one right, says he, is within the statute.

But it is time to pass from the constitution itself to the consideration of the statutes made in pursuance of it.

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In the winter of 1788, the attention of the legislature *was very thoroughly awakened to this subject, in consequence of certain long leases which had been taken of the *Indian* lands, and which the legislature, by concurrent resolution, declared to be infractions of the constitution, and void. That occurrence led, in the first place, to the act of the 1st of *March*, 1788, appointing commissioners to hold treaties with the *Indians* within this state, and to inquire and report touching purchases of lands suggested to have been made without the authority or consent of the legislature, from the said *Indians*, or *any of them*, by any person. Here was an act without any preamble or particular reference to the constitution, assuming, as a matter of course, that purchases from *any* of the *Indians*, without legislative sanction, were void. The act of the 18th of *March*, 1788, was passed, which recited, in its preamble, the 37th article of the constitution; and, then, more effectually to provide against infractions of it, the legislature declared that "if any person, unless under the authority, and with the consent of the legislature, in any manner or form, or upon any terms whatsoever, should purchase any lands within the limits of this state, or make contracts for the sale of lands within the limits of this state, with any *Indian* or *Indians* residing therein, he should forfeit 100 pounds, and be punished by fine and imprisonment. And if any person entered upon, or took possession of, any lands within this state, pretending any right therein, under color of any purchase from any such *Indian* or *Indians*, and not under the authority, and with the consent of the legislature, he should be subject to the like pains and penalties."

This act is very comprehensive in its terms. It applies to the purchase of *any lands* of *any Indian* within this state, without reservation or exception. I entertain no doubt, the act, in all its extent, was well warranted by the 37th article of the constitution. Some of the most eminent civilians of that day were in the legislature, at the time of the passing of the act, and voted for the bill

(which passed unanimously ;) and I consider the legislative construction of the constitution, then given, as a very respectable, *and a very commanding authority in the case. (a) If the constitution had been really silent or doubtful on the subject, yet, the statute expressly reached the case of purchases from individual *Indians*; and, as Lord *Mansfield* observed, in *Pattison v. Bankes*, (*Cowp.* 543.) there are a variety of cases where it has been determined, that strong words in the enacting part of a statute, may extend it beyond the preamble. We have the rule laid down by the K. B., in *The King v. Athos*, (8 *Mod.* 144.) that the enacting clause may be applied to other mischiefs than those mentioned in the preamble.

This act, as it appears to me, puts an end to all further question touching the construction of the constitution; and, at any rate, the enacting clause puts an end to all pretence of validity in the claim of the defendant in error, under his unauthorized purchase from *William*, the *Indian*, in 1797.

It is probable, the convention, when they passed the article of the constitution under review, may not have anticipated the conveyance of lands from the whites to the *Indians*, as a probable event. But their provision did not, and ought not, to have rested upon the inquiry, from what source the *Indian* title was acquired. It was immaterial whether the *Indians* held their lands by immemorial possession, or by gift or grant from the whites, provided they had an acknowledged title. In either case, the lands were of equal value to them, and required the same protection, and exposed them to the like frauds. As early as the year 1788, individual *Indians* had acquired titles from the whites, and in *September*, 1788, we have the remarkable fact of the *Oneidas* ceding the whole of their vast territory to the people of this state, and accepting a retrocession of a part, upon restricted terms, and with permission only to lease certain parts for a term not exceeding twenty-one years. No one will pretend that these *Oneida* lands were not, after the cession, and retrocession, as well as before, within the protection of the constitution, and of the act of *March*, 1788.

Though I do not deem it requisite to go further, in order *to form a just conclusion upon the case before us, yet it will contribute to strengthen that conclusion, if we trace through succeeding statutes, the constant solicitude of the legislature to discharge their duty, as trustees to these *Indians*, by giving extraordinary protection to them against their own weaknesses, and against the superior address, intelligence and activity of the whites.

By the act of the 22d of *March*, 1790, it was declared, that no person should maintain any action upon any contract to be made after the 1st of *July*, 1790, against any *Indian* residing upon any lands reserved to the *Oneida*, *Onondaga* and *Cayuga Indians*. This act was passed several years before *Smith* made his purchase, and it certainly goes to render its validity very questionable, even if there were no other statute objections. The purchase was a

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(a) *Samuel Jones*, *Egbert Benson*, *James Duane*, and *Richard Harison*, esquires, were members of the legislature when the bill passed.

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contract made with an *Indian*, residing on the lands reserved to the *Oneidas*, and an action of ejectment is a mixed action, affecting not only the land itself, but the person claiming title. If the *Indian* was rendered incompetent to bind himself by a contract, upon which an action could be sustained against him, is it to be supposed that he was deemed competent for the most important of all contracts, the alienation of his lands? There seems to be a manifest inconsistency in the proposition, that a person is incompetent to make a personal contract, and yet is competent to make a contract binding *in rem*; that he has capacity to convey, yet is not competent to warrant the title. But to proceed with the detail of the code of *Indian* statute law; the act of the 11th of *March*, 1793, appointed agents on the part of this state, to make further purchases of lands of the *Oneida*, and other *Indian* tribes, and to propose to them that certain officers of government, and their successors, should be vested, as trustees for the *Indians*, with the property which they might choose to retain, in order to prevent any encroachments thereon, and to bring actions of trespass for the benefit of the *Indians*. By the act of the 27th of *March*, 1794, six persons, by name, were appointed trustees for the *Indians* residing within this state, and for each tribe, with power to make such agreements with the *Oneida*, *Onondaga* and *Cayuga Indians* respecting their lands, as should produce to them an annual income; and every grant and conveyance *to be obtained from any of the said *Indians*, or nations, or tribes, was to be to the use of the people of this state. By the act of the 9th of *April*, 1795, commissioners were again appointed to make arrangements with those *Indians*, relative to their lands, parts of which they had, sometimes collectively, and sometimes individually, leased to the whites, under a prior authority, for terms not exceeding twenty-one years; and under which authority the present defendant in error is stated in the act to have obtained leases of the *Oneidas*. These commissioners were directed to agree with the *Indians*, to set apart lands for them, collectively, by tribes, or individually, by families, and such lands were to remain to them and their posterity unalienable and without power to lease. The improvidence with which the *Indians* had used the power to lease, was, probably, the reason why it was so soon withdrawn from them; and by the subsequent act of the 1st of *April*, 1796, certain lands were to be quit-claimed to the *Oneidas*, under a stipulation that they were not to be sold or leased, without the express consent of the legislature.

All the statutes which I have hitherto noticed were passed prior to the purchase by *Smith*; and every one must have observed, with some degree of astonishment, the never-ceasing anxiety of the legislature on the subject of purchases of *Indian* lands, and the great accumulation of provisions condemning the policy, declaring the injustice, and denying the validity of such purchases. There is, in the first place, the constitution itself, declaring all purchases of lands from the *Indians*, without the consent of the legislature, void. Then we have the act of the first of *March*, 1788, appointing commissioners to inquire whether any purchases of land had been made without authority of the legislature, from the *Indians*,

or from any of them, by any person. Next, we have the act of the 18th of *March*, 1788, prohibiting, under heavy pains and penalties, any purchase of any lands, in any manner, or upon any terms, from any *Indian* or *Indians*, or from entering upon any lands under color of any such purchase. Then comes the act of *March*, 1793, recommending to the *Indians* to consent, that some of our public officers should become their *trustees, to secure their lands from encroachment and trespass. Next is the act of *March*, 1794, providing arrangements with the *Indians* to secure to them an annual income from their lands. Lastly, we have the act of *April*, 1795, recommending to the *Indians* to agree to have their lands set apart for them, collectively, or individually, and to be unalienable, without even the power of making short leases.

The acts which have been passed by our legislature, on the subject of *Indian* lands, since 1797, are well worthy of notice, as they throw light on those which preceded that period; and they are all to be taken and construed as being made *in pari materia*, and founded on the same principles, and animated with the same spirit.

The act of *March* 15th, 1799, considers the *Oneidas* as very defenceless; and, in order to protect them from imposition, it directs the attorney of the district to advise and direct them in all controversies that may arise between the tribe, or any individual thereof, and any other person, and to defend suits instituted against them, and to institute suits for them, and particularly for trespasses committed upon their lands. The same protection was, afterwards, in 1806, extended to the *Onondagas*. Again; the act of *April* 7th, 1801, prohibits the sale of ardent spirits to any *Oneida Indian*; and any pawn taken therefor was recoverable back; and in 1817, it was made unlawful for a white person to receive a pawn or pledge, on any occasion, or under any pretence, from any *Indian* residing on the *Oneida* reservation. The act of *April* 4th, 1801, extended the inability to maintain actions against *Indians*, on contracts, to the *Stockbridge* and *Brothertown Indians*, and declared that their lands should be unalienable, and that even contracts between *Indians* themselves, relative to their undivided lands, should be void. The same inability to be sued was extended, in 1807, to the *Senecas*.

Could any person, after reading all these provisions, have had any doubt, that an *Oneida Indian*, residing with his tribe, was not a person from whom a white could make a valid purchase? The legislature most clearly thought so, or they would not have passed the act of *March* 7th, 1809. That is the act under which *Miller*, the plaintiff in error, *claims to have made a valid purchase from *William*, the *Indian*; and there can be no doubt, that his purchase was warranted by the act, and that he is entitled to hold the land in question, unless *William* had lawfully parted with his title in 1797. The act declares, that every conveyance thereafter to be executed by the *Indian* patentee, or his heirs, to any citizen of this state, should be valid, if executed with the approbation of the surveyor-general.

The legislature very evidently understood, at the time, that they were granting a right or power not then existing. It was an act

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for the relief of the heirs of the *Oneida Indians*, to whom lands had been granted, and there was no suggestion in it of any intention to confirm a right already existing, and which had been the subject of doubt. It has none of the features of a declaratory act; it is couched in the plain language of the sovereign, creating right and conferring power. We are authorized to consider the act as decisive evidence, that the opinion of the legislature, in 1809, was in coincidence with the opinion of the legislature in 1788, and in favor of the construction that purchases of land from individual *Indians*, without express legislative sanction, were unlawful and void. On the 2d of *March*, 1810, a further act was passed in relation to those heirs, enjoining special care and diligence upon the surveyor-general, and requiring him to ascertain that the conveyance was obtained fairly, and for a competent consideration, and that such consideration had been paid and properly secured, before he endorsed his approbation upon the conveyance. So incessant has been the paternal care of our rulers over these *Indians*, and so demonstrable and so deep their conviction; that the *Indians* do not deal on equal terms with the whites, and have not the requisite discretion to make bargains for themselves.

There are several acts which have been passed in favor of particular *Indians*, by name, which I shall not stay to examine, for they afford no general conclusion one way or the other. They usually contained grants of land under considerable restrictions, and with more or less caution and admonition, as the particular case might seem to require.

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*My conclusion upon the whole case is,

1. That the patent to *John Sagoharase* and his heirs, was a patent to him and his *Indian* heirs, whatever their civil condition and character might be, whether aliens or natives.

2. That this patent is to be taken to have issued by due authority, and is equal to an express legislative grant of the lands to *John* and his *Indian* heirs.

3. That if the civil or political condition of the *Indian* heir was material in this case, as seems to have been held by the court below, and by some of the counsel here, then my conclusion would be, that by our law he cannot be deemed a citizen.

4. That by the constitution and statute law of this state, no white person can purchase any right or title to land from any one or more *Indians*, either individually or collectively, without the authority and consent of the legislature, and none such existed, when the land in question was purchased by *Peter Smith*, in 1797.

I am, accordingly, of opinion, that the judgment of the Supreme Court is erroneous, and ought to be reversed.

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This being the opinion of the rest of the court, (STRANAHAN, Senator, dissenting,) it was, thereupon, ORDERED, ADJUDGED and DECREED that the judgment of the Supreme Court be reversed. &c., and that the record be remitted, &c.

Judgment of reversal.

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*against.*JOHN BRADSHAW, *defendant in error.*

IN ERROR to the Supreme Court. (*Vide S. C., ante, p. 103. 106.*) *Bradshaw*, who was plaintiff in the justice's court, declared, for a trespass committed by *Rogers* and *Magee*, on his land, by entering thereon, and cutting and despoiling timber, growing and standing on the land, from the north part of the land southward to a certain distinguished white pine tree, situate and standing on the west side of the *Waterford* and *Whitehall* turnpike road, to his damage fifty dollars.

The defendants, in the court below, admitted that they entered, &c. on the plaintiff's land, but denied the amount of damages, and the plaintiff's right to recover, and pleaded a justification, under the several acts relative to canals, and the amendments of, and additions to the said acts, from time to time made and passed.

The plaintiff, on the trial before the justice, proved the cutting of the timber, and the value thereof, by *John B. Taylor*, who, on his cross-examination, said, that the ground on which the trespass was alleged to have been committed, was the same which the defendants were putting in the form of a turnpike road.

The defendants relied on the acts of the 17th of *April*, 1816, (sess. 39. ch. 237.) and the 15th of *April*, 1817, (sess. 40. ch. *262.) (b) and the subsequent acts relative to canals; and undertook to show, that they were employed by the canal commissioners, or their agents, and by that authority entered upon the lands claimed by the plaintiff, and cut down, and otherwise removed the growing timber and wood, in conformity with a contract which they had entered into with *Samuel Young*, as one of the canal commissioners; and that they had committed no trespass, and had done no act or thing which they were not authorized to do, and which was not necessary to be done, in conformity to the laws aforesaid.

It was proved, by the defendants, that they had entered into a contract with *Samuel Young*, one of the canal commissioners, to make a turnpike road, in lieu of part of the turnpike road which had been taken for the canal; that the same had been approved by the chief engineer; that the cutting of the timber complained of, was necessary to complete the said road; that the chief engi-

The acts of the 7th of *April*, 1816, (sess. 39. ch. 237. and the 16th *April*, 1817, (sess. 40. ch. 262.) relative to canals, authorized the commissioners to enter upon and occupy any lands which may be necessary for the canal improvements.

If, therefore, it becomes necessary for the prosecution of the canals, to occupy part of a turnpike road, the commissioners, or their agents for that purpose, may lawfully enter on the land of

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a person, for making a new road in the place of such part of the turnpike road discontinued by them and taken for the purposes of the canal.

The act of *April* 13, 1820, (sess. 43. ch. 102. s. 21.) which authorizes the commissioner to discontinue or alter any part of a public road or highway, when it interferes

with a proper location or construction of the canal, applies to a turnpike road, it being, in the popular and ordinary sense, a public road or highway.

Though the party whose land is taken for the use of the public, is justly entitled to an adequate compensation, yet, it seems, that the commissioners, or their agents, are not liable as trespassers, for entering upon and occupying the land, before compensation has been made, though the act of 13th *April*, 1820, under which they acted, contains no provision for making compensation. And, especially, they are not liable in trespass to the party, when the act of *April*, 1817, providing a compensation for any injury to individuals, caused by taking their lands for the purposes of the canal, extends to cases arising under the act of 1820, as well as under the former acts. (a)

(a) *Vid. Lansing v. Smith*, 4 *Wendell's Rep.* 9. *Wheelock v. Pratt*, 4 *Ibid.* 647. *Calking v. Baldwin*, *Ibid.* 667. *Vanderbilt v. Adams*, 7 *Cow. Rep.* 349. *Bradshaw v. Rogers*, *ante*, p. 103. *Crittenden v. Wilson*, 8 *Cow. Rep.* 165. *Culver v. Avery*, 7 *Wendell's Rep.* 389. *Livingston v. The Mayor of New-York*, 8 *Wendell's Rep.* 85. *Gosler v. The Corporation of Georgetown*, 6 *Wheat. Rep.* 593.

(b) 1 *Rev. Stat.* 251.

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neer had several times examined the ground, to ascertain the best route for the canal in passing the place of the alleged trespass; that the present route of the canal was approved and directed by the chief engineer; that the turnpike road was necessarily and unavoidably encroached upon by the canal course; that another road was indispensable in that place, and *was necessary to be made before the canal was commenced there*; that the land on which the trespass is alleged to have been committed, was necessary, if not the only course for the road, as the least expensive and the best for the accommodation of the public; that the ground, on which the defendants made the road, was staked out by the assistant engineer, by direction of the chief engineer; and that, under the authority of the canal commissioners, the assistant engineer directed the defendants to work the road on the land on which the trespass was alleged to have been committed.

The justice, having heard the proofs and allegations of the parties, and deliberated thereon, gave judgment for the defendants.

The plaintiff removed the cause, by *certiorari*, to the Supreme Court, and, in *May term* last, the judgment rendered by the justice was reversed by that court.

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*S. Young, and H. Bleecker, for the plaintiffs in error.

A. Van Vechten, for the defendant in error.

THE CHANCELLOR. This case came before the Supreme Court upon *certiorari*, founded on a justice's judgment.

It appeared by the return of the justice, that *Bradshaw* sued *Rogers* and *Magee*, in trespass, for entering, in *June*, 1821, upon his land, and cutting down timber. They justified under the several acts relative to the canals. It was shown in proof, that the route of the northern canal, at the place in question, was directed by the chief engineer; that the turnpike road adjoining the place where the trespass was alleged to have been committed, was unavoidably encroached on by the tract or course of the canal, and that another road was indispensable at that place, and must have been made before the canal was commenced; that the land on which the entry was made was a necessary, if not the only course for the road, and was the least expensive, and best for the accommodation of the public; the chief engineer approved of the road as staked out, and it was staked out by his direction, and was in length about forty-two rods, and in width four rods; and the two defendants, under the authority of the canal commissioners, and in pursuance of a contract with one of them, were putting the ground in the form of a turnpike, when the action of trespass was brought. The timber and wood cut down were supposed to have been worth from 20 to 40 dollars. Upon these facts, the justice held the justification valid, and gave judgment for the defendants.

The Supreme Court reversed the judgment of the justice; and in the opinion, delivered by the chief justice in behalf of the court, it was stated, that the land of *Bradshaw* was not entered

upon for the prosecution of canal improvements, but was taken as a substitute for part of the turnpike road, which had been broken up and taken for the canal, and therefore the case did not come within the powers given to the canal commissioners by the act of 1817. It was further stated, that the case did not come within the powers granted by the act of 1820, because a turnpike was not a public road or highway, within the meaning of the act, *and because the act contained no provision for compensation to the owner of the land so taken.

We must carefully examine the provisions of those two acts, in order to see whether the Supreme Court were, or were not, mistaken, in their construction of the powers conferred upon the canal commissioners.

The act of 1816, (sess. 39. ch. 237.) (a) had made it the duty of the commissioners to cause those parts of the territory of the state, which might be upon or *contiguous* to the probable courses and ranges of the canal, to be explored and examined, for the purpose of fixing the most eligible routes; and they were to cause all necessary *surveys and levels to be taken*, and to adopt and cause to be executed proper *plans*, for the construction and formation of the canals.

This act was the commencement of that great undertaking, which, in the language of one of our statutes, was "to advance the prosperity and elevate the character of the *United States*." It began by sketching out the duty of the commissioners upon a liberal scale, and with just confidence in their discretion. They were to explore and examine lands, and to cause surveys and levels to be taken. Nothing was said about impediments to be thrown in their way by trespasses upon private right, or that they were to make the course of the canal bend to the interest, or the unreasonableness of individuals. If private rights of every description were not to give way, upon such an occasion, to the permanent interest of the public, upon fair and reasonable compensation, it would have been difficult even to explore and examine. and make surveys and levels; and it would have been quite idle to think of adopting and acting upon any plan, suitable to the boldness of the design, and adapted to the success of its execution.

Next came the act of 1817, (sess. 40. ch. 262.) (b) continuing the powers conferred upon the commissioners by the former act, and increasing them largely. It was declared to be lawful for the canal commissioners, and each of them by themselves and agents, to enter upon and use, all and singular, any lands, waters and streams, necessary for the prosecution of the improvements intended by the act, and to make all such canals, locks, dams, and other works and *devices, as they might think proper, for making said improvements; doing, nevertheless, no unnecessary damage.

Here the question occurs, Were not the commissioners authorized, by this act, to enter upon the land of the defendant in error, and to use it to the extent and in the manner stated in the record? The Supreme Court have answered the question in the negative, because,

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(a) 1 Rev. Stat. 219.

(b) 1 Rev. Stat. 221.

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they say, the entry was not for the prosecution of the canal improvements, but to make a substitute for part of the turnpike road, which was broken up and taken for the canal. But if the turnpike road was *unavoidably encroached* on by the canal, and *another road was indispensable* at that place, before the canal was commenced, and the land taken was *necessary* for the road, (and all this was proved in the cause,) it would seem to follow, as a clear logical deduction, that the land taken was necessary for the prosecution of the improvements intended by the act. It is very certain, according to the testimony, that the improvement of the canal, at the place specified, could not be prosecuted without the road; and if so, the road was necessary for the improvement. Besides, the commissioners were made the judges as to what lands were necessary for the prosecution of the improvements; and if they had even erred in judgment, as to the extent, or the greater or less degree of that necessity, they could not be responsible as trespassers, unless they had acted in bad faith, or with such egregious indiscretion, as to amount to it. In this case, however, there is no color of pretence for any such suggestion. It was shown, upon the trial before the justice, that the land taken was almost the only course for the road, and was the least expensive, and best for the accommodation of the public. Here was, then, the exercise of a sound discretion, in the execution of the trust; and we perceive by the facts, that the road was through woods, or unimproved lands, for 42 rods only, and that all the wood cut down was not worth more than from 20 dollars to 40 dollars. I cannot perceive any just ground, in this case, for a charge against the commissioners, either of abuse or of misapplication of power. Upon the very straitened construction set up, on the part of the defendant in error, it might truly be said that if the course of the canal met a house, or barn, *or barrack, or shed, standing in its way, it could not be removed to the right hand or to the left, and placed upon the adjoining land, of the same owner, without committing a trespass upon that land. It might just as well be said, in such a case, as it has been said in this, that the new ground taken for the occupation of the building, was *not taken for any purpose immediately connected with the canal, but as a substitute for the site of a house or barn, which was broken up and taken for the canal*. Surely, a statute, vesting large powers, resting very much for their exercise in undefined discretion, and checked only by the gentle admonition of doing "no unnecessary damage," ought to be construed more benignly and more liberally. Especially ought this to be the case when the powers are to be applied to a great public object, calculated to intimidate by its novelty, its expense, and its magnitude, and which depended, for its successful results, upon decision of character, as well as upon maturity of judgment.

The act also says, that the commissioners were to make all such canals, locks, dams, *and other works and devices* as they might think *proper*, for making such improvements. This was likewise a grant of very extensive power. The act could not readily have used words of more general and unfettered import. *The works and devices* were not explained or enumerated. They were only to be

proper for making the improvements, and were to cause no *unnecessary* damage to private rights; what was proper to be done, and what damages were unavoidable, were questions left entirely to the judgment of the commissioners. They required but two qualifications in the application of this power, in order to exempt them from the charge and the penalties of trespass. They were to act with good faith, and with sound common sense, and then it was impossible for them to be guilty. We must take expressions in the most extensive sense, when it is probable the lawgiver had in view every thing pointed out by that extensive sense, and when we give to the expressions the sense most suitable to the subject, and best adapted to the facility and success of a great and generous scheme of public policy. Every interpretation which leads to an absurdity, or to embarrass or defeat the purposes *of the statute, is to be avoided. If the commissioners, under the act of 1817, had no power to make a substituted road, on the neighboring ground, in place of that part of the turnpike they had broken up, what was to be done? They could not go on with their work, nor could the public travel without a road. The line of the canal must have been either diverted from its course, and, perhaps, with great and lasting public inconvenience, to avoid touching the turnpike, or else the progress of the canal must have been suspended, until an opportunity was given for an application to the legislature for new powers. I should doubt, whether any construction would be a just one, that leads to such inconvenience or absurdity.

The next part of the act of 1817, provides compensation for any injury produced to any individual, by the exercise of this power. It declares, that if lands, waters or streams, taken and appropriated for any of the purposes aforesaid, shall not be given, it shall be the duty of the commissioners to cause the damages to be estimated, in the mode prescribed, and paid. The compensation, in this case, is for damages for lands taken *for any of the purposes aforesaid*, and the remedy is co-extensive with the injury. Whatever lands may be appropriated, under the powers, those lands are to be paid for, if the party refuses to give or grant them. The land, over which the turnpike road led, before it was broken up by the canal, we are to presume had been paid for under the act of 1806, establishing the *Waterford* and *Whitehall* turnpike road; and the title to that land was in the company, and was to go to the state when the corporate company should be dissolved. Under the act of 1817, it was, also, provided, that where lands were taken, as being necessary for the prosecution of the improvements, the fee should vest in the state, on being paid for. But I apprehend, that the state, in this case, would hold the fee subject to the easement, or right of the turnpike corporation to use the 42 rods of newly-made road, according to their charter. I should have no doubt, that in such case, if the state should pay *Bradshaw* for these 42 rods, that they would hold the fee in trust for the turnpike corporation, to the extent of their corporate right in *the road, and thus every conflicting interest, under a just and fair operation of the act of 1817, would be made to harmonize, and be satisfactorily adjusted.

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According to my view, then, of the case, the Supreme Court were mistaken when they held that the act of 1817 did not apply to the case, on the ground, that the land of the defendant in error had not been entered upon for the prosecution of the canal improvements. I apprehend, they were equally in an error when they held, that under the subsequent act of 1820, the proceedings were indefensible. By the act of 1820, (sess. 43. ch. 202.) it was declared, "that in all cases in which it should be deemed necessary by the principal engineer, in laying out the line of the canals, or any work connected therewith, to discontinue or alter any part of a public road or highway, on account of its interfering with a proper location or construction of either of the canals, the engineer shall be authorized to make such discontinuance or alteration, provided that the canal commissioners, before they obstruct the passage on any part of a highway now legally established, shall open, and reasonably work, in order to render it passable, such part of the said highway as may be new laid by the engineer."

In the opinion of the Supreme Court, this provision does not apply to a turnpike road, because it is private property, and not a public road or highway, within the meaning of the act. Here, I think, also, the construction is too limited for the object, and the subject matter of the provision. A turnpike is a public road or highway, in the popular and ordinary sense of the words, and in that sense the legislature are to be presumed to have employed them. Turnpike roads are, in point of fact, the most public roads or highways that are known to exist, and, in point of law, they are made entirely for public use, and the community have a deep interest in their construction and preservation. They are under legislative regulations, and the gates are subject to be thrown open, and the company indicted and fined, if the road is not made and kept easy and safe for the public use. In the act incorporating the *Waterford and Whitehall Turnpike Company*, a numerous description of *persons are entitled to use the road, at all times, free of toll; and all sleds and sleighs, and the horses and cattle drawing them, are exempted from toll. If the land over which the road is conducted be owned by the company, that does not make it less a public road. If a highway be laid out according to law, the fee or right of soil may and often does, remain in the original owner, and the public have only a right of way. It is a general rule of the common law, that the right of soil in a public highway belongs to the owner of the adjoining ground, subject to the right of passage in the public, and he may maintain trespass for any exclusive appropriation of the soil. (*Cortelyou v. Van Brundt*, 2 Johns. Rep. 357.) There is nothing, therefore, in a turnpike road that should exempt it from coming under the description of a public road or highway; and because the engineer is to draw up and file a description of the part of the road discontinued and laid anew in the town clerk's office, that circumstance does not seem sufficient to control the construction. There is no repugnancy in the law in applying that act even to a turnpike road. It is, at least, a very harmless proceeding, and it may, on many occasions, be important to the public, that there should be this documentary evidence, in

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the town clerk's office, of the change of the tract of the turnpike road. *IN ERROR.*

An objection was here taken by the defendant in error, which ought to be answered. It does not appear that the principal engineer had actually drawn up in writing a description of the road discontinued and new laid, and filed the same in the town clerk's office. This is a technical objection, rather to the form than to the substance of the transaction; for we have the fact, that the route of the canal over the turnpike road, and the discontinuance of that road, at that place, and the location of the new road along the side of the other, were all actually done by the chief engineer. It would be rather too rigorous a construction to hold, that the omission to draw and file the description rendered the first entry a trespass. The more reasonable interpretation is, that the new road cannot be considered as the legally established public road until that be done; but this does not affect the question of the entry of the commissioners, in the first instance, to lay out and make the road. This is a preliminary act, which, I apprehend, may be safely done, without involving the commissioners in the charge of trespass.

But the court below consider the absence of any provision in the act of 1820, for compensation to the owner of the land, for damages sustained by such an alteration of the road, as a still more serious difficulty in the application of the statute to the case. It appears to me to be a sufficient answer to this objection, that the act of 1817 had provided the remedy for compensation for every injury committed by the commissioners in the execution of their powers; and when new powers are added, (though, I apprehend, the act of 1820 did not, on this point, confer any power not before existing,) the same remedy would apply. All statutes, said Lord *Mansfield*, (*Doug.* 30.) which are *in pari materia*, are to be taken together, as if they were one law; and, in many instances, a remedy provided by one statute, will be extended to cases arising on the same subject matter under a subsequent statute. The act of 1820 was only a specification of the course of duty of the commissioners in a particular case; and it would have been quite unnecessary, and, in my humble opinion, quite idle, to have provided, that the general remedy for all damages occasioned by the exercise of any part of the whole mass of undefined power given by the act of 1817, should apply to a portion of that power exerted in the particular manner provided for by the act of 1820.

If the remedy given in 1817 did not extend to lands appropriated under the powers mentioned in the latter act; yet I should doubt exceedingly, whether the general principle, that private property is not to be taken for public uses without just compensation, is to be carried so far as to make a public officer, who enters upon private property by virtue of legislative authority, specially given for a public purpose, a *trespasser*, if he enters before the property has been paid for. I do not know, nor do I find, that the precedents will justify any court of justice in carrying the general principle to such an extent. The Supreme Court, in one part of their opinion, admit, that the canal commissioners have a right to

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enter upon and occupy lands necessary to effectuate the objects of their appointment, without having first paid the loss and damage the proprietor of lands may sustain. This equitable and constitutional title to compensation, undoubtedly, imposes it as an absolute duty upon the legislature to make provision for compensation whenever they authorize an interference with private right. Perhaps, in certain cases, the exercise of the power might be judicially restrained, until an opportunity was given to the party injured to seek and obtain the compensation. But it would deserve a very grave consideration, before we undertook to lay down the broad proposition, that, notwithstanding a statute clearly and expressly directed the assumption of private property for a necessary public object, it would still be a nullity, and the officer who undertook to execute it a trespasser, if a provision for compensation did not constitute part and parcel of the act itself. However, it is not necessary to give any opinion on this point, for, as I have already observed, the provision for compensation in the act of 1817, extended to cases arising under the act of 1820.

I am, accordingly, of opinion, that whether the justification of the commissioners be referred to the act of 1817, or of 1820, it is equally valid and effectual, and that the judgment of the Supreme Court is, consequently, erroneous, and ought to be reversed.

This being the unanimous opinion of the court, it was, thereupon, ORDERED, ADJUDGED and DECREED, that the judgment of the Supreme Court be reversed, &c., and that the record be remitted, &c.

Judgment of reversal

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*JOHN CHAMBERLAIN, *plaintiff in error*,
against
ISAAC GORHAM, *defendant in error*.

IN ERROR to the Supreme Court. (*Vide S. C. ante*, p. 144.)

A notice, accompanying a plea of the general issue, under the statute, need not be as precise and particular as a special plea. It is sufficient, if it contain such a statement of the special matter, to be given in evidence at the trial, as may prevent the plaintiff from being taken by surprise.

J. Maynard, for the plaintiff in error. He cited 1 *Chitty's Pl.* 472. 15 *Johns. Rep.* 230. 2 *Co. Inst.* 427. 1 *N. R. L.* 336.

Talcot, (Attorney-General,) contra. He cited 13 *Johns. Rep.* 320. 1 *Salk.* 288. 10 *Johns. Rep.* 322. 4 *Taunt.* 114. 11 *Johns. Rep.* 547. 19 *Johns. Rep.* 49.

Thus, where the notice stated, that the defendant would give in evidence, that the notes, on which the suit was brought, were given for the consideration of the sale and conveyance of a certain piece of land, &c., and that, when the notes were given, the plaintiff executed and delivered to the defendant a covenant, that if there should be any outstanding judgments, which operated as a lien on the land conveyed, and the grantee should be obliged to pay the same, the amount paid should be deducted from the notes, &c.; and that, at the time, &c., "there were divers judgments, at the time, &c. outstanding against the plaintiff, which were a lien on the land so conveyed, and which the defendant was obliged to pay, and did pay, in order to prevent a sale of the land, and which sums amounted to 500 dollars, which the defendant set off, &c. : *Held*, that this notice was sufficient to let in the proof of the payment of judgments, without specifying the particulars of such judgments

THE CHANCELLOR. This case came before the Supreme Court, on the return to a writ of error, to the Court of Common Pleas of *Seneca* county.

Gorham, as plaintiff in that court, declared on a note of hand, made by *Chamberlain* to him, for 100 dollars, dated *November 9, 1815*, and payable four years after date, and not negotiable, and which note was stated to have been lost. The loss of the note was proved at the trial; and it was further proved, that the note, with some others, was given to secure a part of the consideration-money for a sale and conveyance of lands, from *Gorham* to *Chamberlain*. The note was assigned, soon after it was made, to one *Anthony Snyder*, who gave notice of the assignment to the maker, and it was shortly afterwards again assigned to *Jacob Fogleman*, *who is now the person beneficially interested as owner of the note.

The defendant, *Chamberlain*, offered to give in evidence, upon the trial, as a set-off against the note, that there were divers judgments, at the time of giving of the note, outstanding against *Gorham*, the payee, which were a lien upon the land so conveyed from *Gorham* to *Chamberlain*, and which *Chamberlain* was obliged to pay, and did pay, to prevent a sale of the lands under the judgments. The defendant, *Chamberlain*, offered to give in evidence those judgments, and the records thereof, and the executions thereon, and the payment thereof, under a notice accompanying the general issue, to that effect; and which notice further stated, that at the time of the conveyance, and of the giving of the notes, an agreement, under seal, was given by *Gorham*, the payee, to *Chamberlain*, the maker of the note, in which he covenanted, that "if there should be any judgments outstanding against him, that should operate as a lien upon the land that day conveyed, so that the maker of the note should be obliged to pay them, in order to prevent a sale of the premises, that the sum or sums so paid, should be deducted from the amount of the notes that day given to secure the payment of the purchase-money." This evidence was rejected by the Court of Common Pleas, and a bill of exceptions was tendered and allowed: the defence being thus shut out, a verdict was taken for the plaintiff, *Gorham*, for the amount of the note, under the direction of the court, and judgment was rendered accordingly. This judgment was affirmed by the Supreme Court, who admit, that "the defence set up, *if proved*, would be valid, notwithstanding the assignment of the note, and notice of such assignment; for the note, not being negotiable, the assignee took it subject to all the equity existing at the time of the assignment; and here the equity or ground of defence was coeval with the date of the note." But that court, as well as the Court of Common Pleas, held, that the notice, accompanying the plea, was too defective to admit the evidence of this equitable defence.

There was an objection made upon the argument, in this court, to the bill of exceptions, as not having been properly *tendered and allowed. But as no such objection was made in the Supreme Court, and as the cause was discussed and decided there entirely upon the question touching the admissibility of the evidence under the notice, or under the general issue without the notice, I appre-

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hend, that the defendant in error comes too late with that objection. He must be deemed to have waived that objection, by the transactions in the court below. (a) The case ought to be determined here, upon the point raised in the Supreme Court, and which was, whether the matter offered by way of defence against the note, was, or was not, under the circumstances, admissible in proof.

When *Snyder*, the first assignee of the note, gave notice to *Chamberlain*, the maker of the note, of the assignment, *Chamberlain* told him, that he did not then know that there were any judgments against *Gorham*, the payee, which were a lien upon the lands for which the notes were given, and the assignee admitted, that if there were any judgments which were a lien upon the land, *Chamberlain* ought to apply the amount of such judgments on the notes *Chamberlain* offered further to prove, that he told the assignee, at the same time, that if there were any such judgments, he had a covenant from *Gorham*, by which he was authorized to pay them, and apply the money, so paid, in payment of the notes. It does not appear, that *Fogleman*, the second assignee of the note, ever gave any notice to the maker of such second assignment. This is, then, a case in which the assignee has no right to complain of any want of good faith in *Chamberlain*, by any concealment of the possible or probable grounds of his defence. The assignee was duly apprized by him, that if there were any such judgments, he had a right to pay them, and discount the payment upon the note, and that he had a covenant from *Gorham* to that effect. Whether there were any such judgments, was a matter of record, equally open to the inspection of both parties. It turned out, afterwards, that there were such judgments, and the only question now is, whether the notice, annexed to the plea, was so defective, as to exclude this very just and equitable defence.

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*The statute says, that the defendant may plead the general issue, and give any special matter in evidence, which, if pleaded, would be a bar, on giving notice, with the plea, of the matter or matters so intended to be given in evidence. The defendant is, then, to give notice to the plaintiff of the special matter on which he relies, so that the plaintiff may not be taken by surprise. The Supreme Court held, many years ago, (8 *Johns. Rep.* 457.) that a notice had never been regarded with the same criticism and nicety as a special plea; and where a defendant gave notice that he would justify under a justice's warrant against the plaintiffs, the notice was held to be sufficient, though it did not state the contents of the warrant, or the cause of action that was expressed in it. (5 *Johns. Rep.* 123.) Under the notice given in this case, it is idle to say, that to permit the defendant to prove, upon the trial, certain judgments against the plaintiff, and executions thereon, which were a lien, and which he had paid, could operate as a surprise. The plaintiff had, by his covenant, agreed to admit the very defence set up; and as the judgments were of record, and the executions matter of record, it was impossible that the plaintiff could

(a) Vide *Beekman v. Frost*, 18 *Johns. Rep.* 544—558.

have been injured by the general terms of the notice. It might as well be said, a plea of payment to a bond would not be good, unless it set forth all the particulars of the payment, as the precise place, and before whom, and in what money, and through whose hands, and whether all at one time, or at different times. It is sufficient to say, generally, that he paid the money according to the condition of the bond, and all the details are left to be supplied by the proof. I should be very sorry to be the means of introducing any inconvenient relaxation of practice on the subject of these notices accompanying the plea. The statute has prescribed no form, and each case must, in some degree, depend upon its peculiar circumstances, and upon the application of sound discretion in the court at the trial. I lay a good deal of stress, in this case, on the fact, that the plaintiff had given a covenant, concurrently with the notes, and as part of one and the same agreement, to allow, as a set-off, the payment of any then outstanding judgments. Why did he give such a covenant, if he had not *good reason to believe there were such judgments? It was a fact, of which he was bound truly to inform himself. The defendant, in his notice, states the covenant, and tells the plaintiff, in his own words, that he shall show there were divers judgments outstanding against him when he gave the deed, and which were a lien upon his land, and that he had been obliged to pay them. It strikes me, as unreasonable and unjust, that the plaintiff, at the trial, should shut out the defence, under the pretence that the defendant did not tell him in the notice, all the particulars of these judgments, when they must have been matter of record, and the defendant stood ready to prove the judgments by the record, and to produce the executions issued thereon, and prove the payment of them. The plaintiff was informed, by the notice, of the specific nature of the defence, and he could have ascertained to his own satisfaction, and with perfect certainty, before the trial, whether the defence was a good one, by searching the records where judgments binding on the land must have appeared, if they existed.

Upon the whole, I am of opinion, that the notice was sufficient, under the particular circumstances of this case, to let in the proof of the payment of the judgments; and consequently, that the judgment of the Supreme Court ought to be reversed, as well as the judgment in the Court of Common Pleas of Seneca county.

This being the unanimous opinion of the court, it was thereupon ORDERED, ADJUDGED and DECREED, that the judgment of the Supreme Court be reversed, &c., and that the record be remitted, &c.

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Vide COVENANT. ASSUMPSIT.

II. *Construction of particular agreements.*

M., with others, signed an instrument, by which he engaged to pay a sum subscribed by him, to *B.* and others, a committee appointed by the members of a church to obtain subscriptions, and contract for the repairs of the church; and the instrument contained a *proviso*, "that no person should be obliged to pay the sum which he subscribed, unless a sufficient sum was raised to repair the church." The committee entered into a contract with a person to make the repairs for a specific sum, who agreed to take the subscriptions, being about half of that sum, in payment, and to raise the residue by a sale of the pews, which he was authorized to make: *Held*, that this was a compliance with the condition of the subscription, and that *M.* was, therefore, liable to pay the sum subscribed by him. *M. Auley v. Billenger*, 89

ALIEN.

W. E. came from *England* in 1774, and resided in this state, and was an officer in the *British* army. Having been arrested, in 1776, as a person disaffected to the *American* revolution, he was, in *August*, or the beginning of *September*, 1776, a prisoner, on his parole, and remained such prisoner, at *Albany*, until *December* or *January* following, waiting for a passport to join his regiment, when he either joined the *British* army, or went to *England*, where he died about the year 1800, being then a general in the *British* service: *Held*, that *W. E.* never became a citizen of this state after it had thrown off its allegiance to *Great Britain*, and became a sovereign and independent state; but that he continued a *British* subject, so that he could not, by reason of his *alienage*, take lands in

this state, by descent from his brother, who died in 1752. *Jackson, ex dem. Russell, v. White*, 313.

Vide GOVERNMENT.

AMENDMENT.

Vide PRACTICE.

ANIMALS FERÆ NATURÆ.

Though property in an animal *fera naturæ*, may be acquired by occupancy, or by so wounding it, as to bring it within the power or control of the pursuer; yet if, after wounding the animal, and continuing the pursuit of it until evening, the pursuer abandons the pursuit, though his dogs continue the chase, he acquires no property in the animal. *Buster v. Newkirk*, 75

ARREST OF SHIPS AND VESSELS.

Under the act authorizing the arrest of ships and vessels for debts, passed August 10, 1799, (sess. 22. ch. 1. 1 N. R. L. 130.) and the act in amendment thereof, passed February 23, 1817, (sess. 40. ch. 60.) the *lien* on the vessel ceases, 1. when she has left the state; 2. when, after being arrested, the owners give bonds, with sureties, &c.; and, 3. when, after being arrested, no security is given, but the vessel has been removed to another port or place in the state, for more than twelve days after the arrest. *Denison v. Schooner Appelonis, &c.* 194

The *proviso* in the last-mentioned act does not apply to the case where the vessel was removed, and continued absent from the port or place where the supplies and materials were furnished more than twelve days before the arrest. *ib.*

Arrest of judgment. *Vide* COURTS OF GENERAL SESSIONS OF THE PEACE.

ASSIGNMENT.

1. Where a note not negotiable is transferred, the assignee takes it, subject to all the equity existing between the original parties at the time of the assignment. *Chamberlain v. Gorham*, 144
2. A plaintiff who had assigned his interest in a chose in action, before suit, cannot be a witness for the defendant, as to his demands, so as to impair the rights of the assignee. *Frear v. Evertson*, 142

ASSUMPSIT.

I. Consideration.

II. Implied assumpsit; money had and received.

I. Consideration.

1. Labor or service, voluntarily done and performed by the plaintiff, for the defendant, without his privity or request, however meritorious or beneficial it may be to the defendant, as in saving his property from destruction by fire, affords no ground of action. *Bartholomeo v. Jackson*, 28

II. Implied assumpsit; money had and received.

2. To entitle a purchaser to recover back part of the consideration-money paid on a contract for the purchase of land, he must show that he has tendered the residue of the purchase-money, and demanded a deed, so as to put the vendor in default. *Hudson v. Swift*, 24
3. Whether the purchaser must not prepare and tender the conveyance to be executed by the vendor. *ib.*
4. Where the consideration-money expressed in a deed to have been paid to the grantor, has not, in fact, been paid to him, he may maintain an action of assumpsit against the grantee, to recover the money agreed to be paid for the conveyance; it not being within the statute of frauds. *Bowen v. Bell*, 333

Vide USURY. BILLS OF EXCHANGE AND PROMISSORY NOTES.

Assumpsit for use and occupation.

Vide RENT.

ATTACHMENT.

Vide ABSENT AND ABSCONDING DEBTORS.

ATTORNEYS, COUNSELLORS, AND SOLICITORS.

1. The new constitution (ART. VI.) has not abrogated the provisions of the act to suppress duelling, which requires counsellors, attorneys, and solicitors, to take the oath prescribed in that act, in addition to the usual oath of office. *In the Matter of Oaths of Attorneys, &c.* 492
2. An attorney or counsel of the Supreme Court, who is a party to a suit, has no privilege, in regard to the venue. *King v. Burr*, 274

ATTORNMENT.

1. An acquiescence, on the part of a landlord, that his tenant should pay the rent to a third person, is sufficient to render an attornment valid. *Jackson, ex dem. Sherrill, v. Brush*, 5
2. A tenant of a mortgagor in possession, after the mortgage has become forfeited, during the continuance of the lease from the mortgagor, may attorn to, and take a lease from the mortgagee; and, in an action brought against him by the mortgagor for rent, under his lease, may set up such attornment as a legal defence. *Jones v. Clark*, 51

B.

BAIL.

1. A sheriff cannot be bail in this court. *Bailey v. Warden*, 129
2. To authorize a judge's order to hold to bail, in an action for a libel, the affidavit must not only state the libel, or cause of action, but some special reason for granting the order. *Norton v. Barnum*, 337
3. On a motion of the defendant to set aside a judge's order to hold to bail, a supplemental affidavit of the plaintiff, to cure the defect

of his original affidavit, is not admissible.
Norton v. Burnum, 337

BARGAIN AND SALE.

Vide Use.

BARON AND FEME.

- I. *Marriage.*
- II. *Husband's interest in his wife's estate, and conveyances by husband and wife.*

I. *Marriage.*

1. Marriages, where one or both of the parties are slaves, are legal, by the statute. (2 N. R. L. 201. sess. 36. ch. 88.) *Marbletown v. Kingston*, 1

Vide SLAVES. POOR.

- II *Husband's interest in his wife's estate, and conveyances by husband and wife.*
- 2 Where a wife joins her husband in the execution of a deed of her own lands, but does not acknowledge the deed before a magistrate, according to the statute, her right is not divested. *Jackson, ex dem. Corson, v. Cairns*, 301
- 3 Where the husband was seised of lands in right of his wife, and the wife died in 1795, and the husband, afterwards, continued in possession of the land, claiming it as his own, and making permanent improvements thereon, and, in 1800, executed a mortgage of the land as his own: *Held*, that the husband, after the death of his wife, was a tenant at sufferance; and his continuance in possession was not adverse or hostile to the true owners or heirs of the wife. *ib.*

Vide SLAVES. POOR, 1. PRACTICE, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Form and requisites.*
- II. *Transfer and endorsement.*
- III. *Presentment for acceptance or payment.*
- IV. *Notice of non-acceptance and non-payment.*
- V. *Liability of the parties.*
- VI. *Action on the bill or note.*
- VII. *Damages and interest.*

I. *Form and requisites.*

- 1 A promissory note has no legal inception, until it is delivered to some person, as evidence of a subsisting debt. *Marvin v. McCullum*, 288

II. *Transfer and endorsement.*

- 2 Where the defendant, being the payee of a negotiable promissory note, endorsed it, in these words: "For value received, I sell, assign and guaranty the payment of the within note, to J. A. or bearer:" *Held*, that this was an *absolute* engagement that the maker should pay the note when due, or that the defendant would pay it himself; and that the plaintiff was not, therefore, bound to prove a demand of payment of the

maker, and notice of non-payment, as in case of an ordinary endorsement. *Allen v. Rightmere*, 365

3. A person receiving negotiable paper in the usual course of trade, for a fair and valuable consideration, from an agent or factor, having no authority to transfer it, but, without knowledge of that fact, or notice of the fraud, may hold it against the true owner. *Coldington v. Bay*, in error, 637
4. *Aliter*, where notes are not received in the usual course of trade; as where R., as agent, received negotiable notes, to be remitted to his principal, and passed them to the defendant, as *security* for responsibilities assumed by him, as endorser for R., and as maker of notes lent R. for his accommodation, but not then payable, and the defendant had no knowledge that the notes so delivered to him by R. belonged to the plaintiff, his principal, but that they belonged to R., who had become insolvent at the time: *Held*, that the notes, being received in the usual course of trade, not for a present consideration, the defendant was not entitled to hold them against the plaintiff. *ib.*

Vide ASSIGNMENT.

III. *Presentment of bill or note for acceptance or non-payment.*

5. Where a bill is drawn, payable at sight, or a certain number of days after sight, there is no fixed rule for its presentment; but the holder is bound to use due diligence, and put the bill into circulation. *Robinson v. Ames*, 146
6. The protest of a notary, deceased, and a register of protest kept by him, in his lifetime, in which were *notes* and *memoranda*, in his hand-writing, proved by a witness, stated, that the notary had made diligent search and inquiry after the *maker*, in the city of *New-York*, (where the note was dated,) in order to demand payment of him; and that he could not be found, &c.; that notice of non-payment, for the *endorser*, was put in the post office: *Held*, that this was sufficient evidence of due diligence, as to a demand of the *maker*; but not of notice to the *endorser*. *Halliday v. Martinet*, 165
7. A bill of exchange, drawn in *Antigua*, upon merchants in *London*, dated *July 18th, 1817*, was not presented for acceptance, until *January 16th, 1818*; but it had been put into circulation, and had passed through several hands, before it was endorsed to the plaintiff: *Held*, that, under the circumstances, there was no default in the presentment of the bill. *Gowan v. Jackson*, 176

IV. *Notice of non-acceptance and non-payment*

8. Where there are *any* funds of the drawer in the hands of the drawee, or if, at the time the bill is drawn, there are circumstances sufficient to induce a reasonable expectation that the bill will be accepted, or paid, the drawer is entitled to *notice* of its dishonor; and to due diligence in the *presentment* of it. *Robinson v. Ames*, 146

9. As, where there were mutual dealings and an open account between the drawer and drawee, and the latter had received considerable shipments of cotton from the drawer, and accepted previous bills, but, on account of the fall in the price of cotton, its value was not equal to the accepted bills, and the last bill drawn was, therefore, protested for want of funds: *Held*, that the drawer was entitled to notice of the non-acceptance. *ib.*
10. Notice of non-acceptance sent by mail, the next day after protest, is sufficient. *ib.*
11. The note or memorandum made in his register, by a notary since deceased, that notice of non-payment for the endorser of a note had been put in the post-office, is not sufficient evidence of due diligence, as it did not state where the endorser resided, nor to what place the notice was directed; but it seems that if the memorandum had stated that the endorser, after diligent search and inquiry, could not be found, that would have been sufficient. *Halliday v. Martinet*, 168
12. Where the drawer of the bill is a partner of the house or firm on whom it is drawn, it is not necessary for the holder to prove, that notice of its dishonor was given to the drawer. *Gowan v. Jackson*, 176
13. An endorser is entitled to strict notice, and if he resides in the same place, it must be personal, or left at his dwelling-house or place of business. *Smedes v. Utica Bank*, 372

V Liability of the parties, and how discharged.

14. Where a promissory note is endorsed, and delivered to a bank for collection, there is an implied undertaking on the part of the bank, in case the note is not paid, to give notice of the default of the maker to all the endorsers; and if they neglect to give such notice, the holder may maintain *assumpsit* against them for the nonfeasance; the deposit of the note, and the probable profit to arise from the money remaining in bank, after it is paid, being a beneficial act, and affording a good consideration to support the promise. *Smedes v. Bank of Utica*, 372
15. A bank, in such case, is bound to employ a competent and faithful person to give the requisite notice to the endorsers, otherwise it is answerable for his default. *ib.*
16. But if the note is delivered to a notary, who is a sworn public officer, to protest, and give notice thereof to the endorsers, it seems, that the bank is not liable for his neglect or default. *ib.*

VI. Action on a bill or note.

17. The defendant, being the payee of a promissory note for 1,500 dollars, endorsed it to the plaintiff, who endorsed and delivered it to a bank. The note was protested by the bank for non-payment, and due notice given thereof to the defendant, who paid the bank 800 dollars, in part, and promised to pay the residue. The bank sued the plaintiff, as endorser, and recovered judgment against him for the balance due on the note, after de-

ducting the 800 dollars, paid by the defendant. The plaintiff paid to the bank 300 dollars, and they continued in possession of the note, which had not been fully paid. The plaintiff declared against the defendant as endorser of the note, in the usual form; and also for money paid, &c.: *Held*, that though the plaintiff could not maintain an action on the note, as it had not been fully paid, and was the property of the bank; yet that he might sustain the action to recover the 300 dollars paid by him, on the count for money paid, laid out, &c., for the defendant, at his request. *Butler v. Wright*, 367

VII. Damages and interest.

18. A promissory note was drawn at Montreal, in Lower Canada, payable to persons resident in England, "with interest until paid in England:" *Held*, that the plaintiffs, on a judgment obtained here against the maker, were entitled to interest only to the time of the judgment; and that according to the legal rate of interest in England. *Scofield and Taylor v. Day*, 102
19. But the plaintiffs were not entitled to any allowance for the current rate of exchange between this country and England, at the time of the judgment; or for any difference of exchange. *ib.*

BOND.

Vide EVIDENCE.

CANALS, AND CANAL COMMISSIONERS.

1. The acts of the 7th of April, 1816, (sess. 39. ch. 237.) and the 16th of April, 1817, (sess. 40. ch. 262.) relative to canals, authorized the commissioners to enter upon and occupy any lands which might be necessary for canal improvements. If, therefore, it becomes necessary, for the prosecution of the canals, to occupy part of a turnpike road, the commissioners, or their agents for that purpose, may lawfully enter on the land of any person, for making a new road in the place of such part of the turnpike road discontinued by them, and taken for the purposes of the canal. *Rogers v. Bradshaw*, in error, 735
Contra in the Supreme Court, 103
2. The act of April 13, 1820, (sess. 43. ch. 102. s. 21.) which authorizes the commissioners to discontinue or alter any part of a public road or highway, when it interferes with the proper location or construction of the canal, applies to a turnpike road; it being, in the popular and ordinary sense, "a public road or highway." 735
Contra in the S. C. 103
3. Though the party whose land is taken for the use of the public, is justly entitled to an adequate compensation, yet, it seems, the canal commissioners, or their agents, are not liable, as trespassers, for entering upon, and occupying land taken for the use of the canal, before compensation is made to the owner, though the act of the 13th of April,

1820, under which they acted, contains no provision for making compensation; and, especially, they are not liable *in trespass*, to the party, when the act of *April*, 1817, providing a compensation for any injury to individuals, caused by taking their lands for the purposes of the canal, extends to cases arising under the act of the 13th of *April*, 1820, as well as under the former acts on the same subject, 735

C.

CERTIORARI.

1. A *certiorari* will not lie to remove into this court proceedings commenced before a judge of the Court of Common Pleas, under the act of the 13th of *April*, 1821, (sess. 43. ch. 194.) to amend the act concerning distresses, &c., until the case has been finally tried, and judgment given thereon, before the judge of the C. P. *Lynde v. Noble*, 80
2. Nor will a writ of *certiorari*, though issued after judgment, stay the writ of restitution in such case. *ib.*

CHAMPERTY AND MAINTENANCE.

1. *H. T.*, who claimed land as heir at law of his father, and who was about to commence suits to recover the possession of it, entered into an agreement with the plaintiff, who had married his sister, by which he covenanted, in consideration of the premises, &c., to convey to the plaintiff the one fourth part of the property which should be recovered; and the plaintiff, in consideration of such covenant, &c., promised *H. T.* to pay, bear and sustain one half of all the expenses which might occur in the prosecution of the intended suits, &c.: *Held*, that this agreement was illegal and void, under the first section of the statute to punish champerty and maintenance. (Sess. 24. ch. 87. 1 *N. R. L.* 172.) *Thalimer v. Brinkerhoff*, 386
2. And the illegality of the agreement was a good defence for the defendant, (who, as the attorney of *H. T.*, had received a large sum of money on a compromise of the suits brought by *H. T.*) in an action of *assumpsit* against him to recover the one fourth of the money. *ib.*
3. To make such an agreement illegal and void, for *champerty*, it is not necessary that the land should be held adversely. *ib.*

CHANCERY.

- I. *Jurisdiction*.
- II. *When and how chancery will relieve*.
- (II) *Plea*.
- IV. *Reference to a master, and report*.
- V. *Decree*.

I. *Jurisdiction*.

1. The Court of Chancery has power to assist a judgment and execution creditor, to discover and reach the property of his debtor, in whosoever hands the same has been placed, out of the reach of an execution at

law; and it makes no difference whether the property consists of *money*, *stock*, or *choses in action*, for the court can compel the debtor, or his trustee, to pay over the *money* to the creditor; and can direct a transfer and sale of the *stock* for the benefit of the creditor. *Hadden v. Spader*, 554

II. *When and how chancery will relieve*.

2. Where the defendant himself waives his defence to a judgment, on the ground of usury, a subsequent purchaser under him, with notice of the judgment, cannot impeach it. *French v. Shotwell*, 668
3. The defendant is not entitled to open an account, unless a sufficient foundation, for that purpose, has been laid in the answer. *Sles v. Bloom*, 669.

III. *Plea*.

4. A plea may be good in part, and bad in part. *French v. Shotwell*, 668
5. Where a plea is more extensive than the subject-matter to which it relates, it may be ordered to stand as to so much of the bill to which it properly applies, and the defendant must answer to the residue. *ib.*

IV. *Reference to a master, and report*.

6. It is not the proper course to refer to a master an examination into facts going to the merits of the cause, and as to which proofs have been taken in chief, in the usual way. *Sles v. Bloom*, in error, 669

V. *Decree*.

7. A decree or judgment by consent, is binding and conclusive, unless procured by fraud, *French v. Shotwell*, 668

CHATTELS.

1. A *cider mill* and *press* erected by a tenant, holding from year to year, at his own expense, and for his own use in making cider on the farm, are not fixtures, but personal chattels belonging to the tenant, who may remove them at the expiration of his tenancy. *Holmes v. Tremper*, 29
2. And if he enters on the land, after the expiration of his tenancy, and removes them, though he may be liable as a trespasser on the soil, yet the property in the *cider mill* and *press* remains in him. *ib.*

CITIES.

New-York.

1. The power of the Supreme Court, under the "act to reduce several laws, relating particularly to the city of *New-York*, into one act," (sess. 36. ch. 86. s. 177, 178. 2 *N. R. L.* 408.) as to opening and improving streets, &c., are confined to the authority delegated by the act, and do not come within the general powers and jurisdiction of the court; and, in the exercise of it, the judges act collectively, as commissioners, rather than as a court. *Matter of Beekman street* 269

- 2 Where, on petition of the corporation of *New-York*, commissioners of estimate and assessment were appointed by the court, in *May*, 1816, pursuant to the act, who made a report in *January*, 1819, which was rejected, and new commissioners of estimate, &c. appointed, who took the oath prescribed, and were nearly ready to report, when the corporation petitioned to discontinue the proceedings, and to withdraw their first petition, and for the appointment of other commissioners of estimate, &c., for extending and widening the same street, on a different plan from that contained in their first petition, the application for leave to discontinue, &c. was refused. *Matter of Beekman street*, 269
3. Where the corporation of the city of *New-York* were authorized, by statute, to cause sewers to be made in the city, and to make a just and equitable assessment of the expense thereof, on the owners and occupants of houses and lots intended to be benefited thereby; though the commissioners appointed for the purpose of making such assessment have a discretion in determining the quantum of benefit which each owner or occupier of a house or lot, within the district, may derive from the common sewer, and with the exercise of which discretion the Supreme Court cannot interfere; yet, as to the persons who are to be assessed, which must depend on the sound construction of the law, as applied to the circumstances of the case, the Supreme Court has power to establish the principle on which the assessment is to be made, and to compel the corporation to act on such principle. *Le Roy v. Corporation of New-York*, 430
- 4 In the proceedings under the "act to reduce several laws, relating particularly to the city of *New-York*, into one act," (sess. 36. ch. 86. 2 *N. R. L.* 342.) in relation to streets, &c., the assessment laid by the corporation, for that purpose, and the notice thereof, must describe the property assessed with accuracy and precision, so as to apprise the owner distinctly of the ground charged for the expense of the improvements. If, therefore, the assessment describe lots fronting on *S. street* as 25 feet wide in front, belonging to *H.*, without mentioning the depth, and they are, afterwards, sold and conveyed by the corporation, as fronting on *S. street*, and "about 100 feet deep," when, in fact, the lots of *H.* were only 75 feet deep, such conveyance will not be construed to extend the lots, in depth, beyond 75 feet, so as to include the lot of *B.*, in the rear, and which fronted on another street. *Jackson, ex dem. Bayard, v. Healy*, 495

CITIZEN.

Vide ALIEN.

CONSIDERATION.

Vide ASSUMPSIT. DEED, 1.

CONSIGNOR AND CONSIGNEE.

Vide FACTOR.

CONSTABLE.

1. The bond taken from a constable, with sureties, under the act, (sess. 36. ch. 35. 2 *N. R. L.* 126.) should be made to the people of the state of *New-York*. *Warner v. Racey*, 74
2. Though a constable neglects to return an execution for above *thirty days*, it is no breach of the condition of a bond taken from him, pursuant to the statute, unless money has come to his hands on account of such execution, which he has neglected or refused to pay over. *ib*

CONSTITUTION.

Vide GOVERNMENT. ATTORNEYS AND COUNSELLORS.

CONTRIBUTION.

Vide SCIRE FACIAS.

CORPORATIONS.

1. A corporation, formed under the act of *March* 22d, 1811, (sess. 34. ch. 67.) "relative to corporations for manufacturing purposes," executed a bond, under their corporate seal, to the appellant, on which a judgment was obtained in *May*, 1817. The corporation having become dissolved in *February*, 1818: *Held*, that the judgment debt of the corporation was binding and conclusive on the members of the association, individually, to the extent of their respective shares. *Slee v. Bloom*, 669
2. Though the trustees or agents of the company are not the trustees or agents of the individual stockholders, yet they may bind the individuals, to the extent of their respective shares, in case of a dissolution of the company. *ib*.
3. And the individual stockholders, on dissolution of the corporation, become liable for a judgment debt, contracted by the trustees or agents of the company, and cannot impeach its consideration, except by showing fraud or imposition, or that it was founded in error. *ib*.

COSTS.

- I. When costs are recoverable.
- II. Costs in error.

I. When costs are recoverable.

1. Where the titles of several causes, in which the names are different, are included in the same affidavit, or notice, the clerk, on entering defaults, is entitled to his fees in each cause. *Boyce v. Thompson*, 274
2. Where there was demurrer to one of the counts in an action of replevin, and issue joined on the other counts, and judgment was given for the defendant, on the demurrer, as well as on the verdict found in his favor on the issues: *Held*, that he was not entitled to treble costs, but to single costs only on the demurrer, and double costs on the issues. *Gibbs v. Bull*, 212
3. Where judgment is given for the defendant on a demurrer, in an action of *audita querela*,

he is entitled to *costs* against the plaintiff, under the 12th section of the act. (Sess. 36. ch. 96.) 295

4. Though costs are not allowed to either party, on a motion to change the *venue*; yet they abide the event of the suit, and may be taxed after judgment. *Norton v. Rich*, 475

II. Costs in error.*

5. Costs are not allowed on an *appeal*, in the Court for the Correction of Errors, on the reversal of a decree of the Court of Chancery. *Evertson v. Booth*, 499

Vide COURT OF ERRORS.

COVENANT.

- 1 The defendant covenanted to pay the plaintiff 2,500 dollars in instalments; and the plaintiff, in consideration of the payments being punctually made, at the times, &c., covenanted to convey in fee simple, to the defendant, certain lots of land; and the parties further agreed, that if the *first* payment was made when it became due, and the defendant wished to have a deed, and would give a bond and mortgage of the premises conveyed, to secure the other instalments, the plaintiff would then give a deed, *with warranty*, and take a mortgage. Before the expiration of the time limited for the first instalment, the plaintiff sold and conveyed the land in fee simple, to B., and assigned over to him the contract made with the defendant. In an action of covenant, to recover the instalments, the defendant pleaded the conveyance of the land to B., whereby the plaintiff became disabled from performing on his part; and that, therefore, the defendant refused to perform on his part. The plaintiff *replied*, that he gave notice to the defendant of the conveyance to B., and of the assignment of the contract to him; and that B., when the first instalment became due, was capable, willing and ready to convey to the defendant, a good title, in fee simple, &c. On *demurrer*, to the replication, because it did not aver that B. was willing and ready to give the defendant a *warranty* deed: *Held*, that the covenants were mutual and independent; that the defendant was bound to aver, in his plea, a demand of a deed from the plaintiff, and an offer or willingness, on his part, to execute the bond and mortgage; that the contract was not rescinded on the part of the plaintiff, nor had he incapacitated himself from performing the contract; as B. might be compelled, in equity, to perform it. *Robb v. Montgomery*, 15
- 2 Where the covenants are *dependent*, the payment of the money and the conveyance of the land must be simultaneous; and there must be an existing capacity to convey, at the time, in the person who is to execute the deed. *ib.*
- 3 But where the covenants are *independent*, and the payment of the money is to precede the conveyance, it is no excuse for the non-

payment, that the other party has not a present existing capacity to convey a good title. *ib.*

4. But if the party who is to pay, offer to do so, on receiving a good title, the other party must give him a good title, or the contract will be rescinded. *ib.*
5. By an agreement under seal, for the sale and purchase of land, the defendant covenanted to pay 250 dollars, as the consideration-money, on the 1st of *January*, 1818 and the plaintiff covenanted that, upon the performance of the covenant of the defendant, he would "execute to him, his heirs and assigns, a good warranty deed of conveyance of the land:" *Held*, that these covenants were dependent; that the words "a good warranty deed of conveyance," referred to the *instrument* of conveyance only not to the *title*; that a plea, therefore, that the plaintiff was not seised, &c., or that he had no title, was not good, or sufficient in avoidance of the action; for where the action is on a deed or *specialty*, a mere failure of consideration is no defence *at law*. *Parker v. Parmele*, 130
6. But a plea, that the plaintiff did not, on the 1st of *January*, 1820, nor at any time since, tender, or offer to execute a good warranty deed of conveyance of the premises, to the defendant, is a good bar; for the vendor cannot maintain an action for the purchase-money, without having executed or tendered a conveyance. *ib.*

COVENANT TO STAND SEISED

Vide USE.

COURT OF ERRORS.

PRACTICE. Costs.

1. *Costs* are not allowed in this court on reversing a decree of the Court of Chancery. *Evertson v. Booth*, 499
2. *Interest* is not allowed, on the deposit of money, on filing the *appeal* to this court. *ib.*
3. A cause cannot be entered in the calendar of causes to be heard, until after the *petition of appeal* addressed to this court, and the *answer* of the defendant to such appeal, have both been regularly filed in this court. *Woodcock v. Bennet*, 501
4. Notices, copies of orders, affidavits, &c. may be served on the *counsel* for the parties in the causes, or on the agents of the attorneys of the parties; but, in the latter case, double time of service is required. *ib.*
5. After a cause has been argued on appeal, and a decree of affirmance pronounced on a point, which, though stated in the printed case before the court, was not much insisted on by one side, or objected to by the other, on the argument, the court refused, on application of the appellants, to modify the decree, so as to allow them to amend their answer, or file a supplemental bill in the court below; especially, as it was to help the plea of the statute of limitations, and the

answer accompanying the plea contained an admission of the debt. *Murray v. Coster*, 603

COURT, SUPREME.

The Supreme Court has a general superintending power to award a *certiorari*, not only to inferior courts, but to persons invested by the legislature with power over the property and rights of others, for the purpose of supervising their proceedings, even in cases where they are authorized finally to hear and determine. *Le Roy and others v. Corporation of New-York*, 430

Vide CITIES. NEW-YORK.

COURT OF COMMON PLEAS.

A court of common pleas has no power to grant a writ of error *coram nobis*. *The People v. Common Pleas of Oneida*, 23

A court of common pleas cannot order a cause which has been brought before it, by *appeal*, from a justice's court, under the act, (sess. 41. ch. 94.) to be *referred*, on the usual affidavit; but must proceed to hear the cause, and decide on the admissibility of the proof offered in the justice's court. *The People v. Washington Common Pleas*, 363

COURT OF GENERAL SESSIONS OF THE PEACE.

1. A general warrant or *venire*, under the seal of the court, to the sheriff, to summon grand and petit jurors, for the trial of all the causes which are to be tried before the Court of General Sessions of the Peace, returned with the panels of jurors annexed, in the manner directed by the 11th section of the act of February, 1813, (sess. 36. ch. 4. 1 N. R. L. 325.) is sufficient; and there need not be a *venire* in each particular cause. *The People v. The General Sessions of Herkimer*, 310

2. Where such *venire* is tested out of term, the Court of Sessions may amend it, it being a mere clerical mistake. *ib.*

A person convicted cannot take advantage of such a mistake in arrest of judgment. *ib.*

COURTS OF JUSTICES OF THE PEACE.

I. *Process, and by whom it may be served.*

II. *Adjournment.*

III. *Appeal to the Court of Common Pleas.*

IV. *Execution.*

I. *Process, and by whom it may be served.*

1. If a justice of the peace delivers to a party a summons signed by the justice in blank, to be filled up with the names of the parties, cause of action, &c., in *his presence*, and under his control, it is not a violation of the fourth section of the statute, passed April 7, 1820. (Sess. 43. ch. 159.) *People v. Smith*, 63

2. *Aliter*, if the party receiving the blank sum

mons, fills it up out of the presence of the justice, though before it is delivered to a constable to be served. *People v. Smith*, 63

II. *Adjournment.*

3. Where, after issue joined, the justice adjourns the cause to another day, and the justice waits a full hour after the time appointed, for the appearance of the parties, that is a reasonable time, and he may proceed to call them, and give judgment against the party who neglects to appear. *Shufelt v. Cramer*, 309

III. *Appeal to a Court of Common Pleas.*

4. No appeal lies from the judgment of a justice's court, on a demurrer, or an issue at law, to a court of common pleas, under the act to extend the jurisdiction of justices of the peace. (Sess. 41. ch. 94.) *Breese v. Williams and Boies*, 280

5. Where there is an appeal from a justice's court, after a trial of an *issue of fact*, there should be a new trial by jury, upon the testimony of the same witnesses, of such issue, taken on proper pleadings in the Court of C. P. *ib.*

6. The practice of the Court of Common Pleas in Washington county, of proceeding on such appeals, by general assignment of error and joinder, is incorrect and improper. *ib.*

7. A court of common pleas cannot order a cause brought before them by *appeal* to be *referred*, but must proceed to hear the cause, and decide on the proof offered in the justice's court. *The People v. Washington Court of C. P.* 363

IV. *Execution.*

8. Where an execution issued on a judgment in a justice's court is not returned at all by the constable, the common law right of the party remains unimpaired, and he may bring an action of debt on the judgment. *Hale v. Angel*, 342

9. The provision of the act of April 5, 1813, (sess. 36. ch. 53.) giving an action against a constable who neglects to return an execution, extends to cases arising under the act extending the jurisdiction of justices of the peace, passed April 10, 1818, (sess. 41. ch. 94.) with this difference, that under the latter act, the constable has *forty* days within which to levy and return the execution. *Gardner v. Jones*, 356

Vide CONSTABLE.

COURTS MARTIAL OF THE UNITED STATES

A soldier in the *militia* is not amenable to a court martial of the *United States*, for having "failed, neglected and refused to rendezvous and enter the service of the *United States*, in obedience to the orders of the governor of the state, in compliance with the requisition of the president of the *United States*." *Rathbun v. Martin*, 343

D.

DEBTOR AND CREDITOR.

1. The Court of Chancery has power to assist a judgment and execution creditor, to discover and reach the property of his debtor, in whosoever hands it has been placed, out of the reach of an execution at law. *Hadden v. Spader*, in error, 554
2. A judgment creditor who has sued out execution at law, which has been returned *nulla bona*, acquires a priority of right to the property, or trust moneys of the debtor, in the hands of his trustee, which cannot be affected or impaired by any subsequent assignment of the debtor, for the benefit of all his creditors generally, or for the benefit of a particular creditor; and any payments made by the trustee of the debtor, after a bill filed by the execution creditor, or after notice of his equitable right, are of no avail against such creditor. *ib.*
3. And it makes no difference whether the property of the debtor consists of *choses in action*, *money* or *stock*; for the Court of Chancery can compel the debtor, or his trustee, to pay the *money* over to the creditor; and can direct a transfer and sale of the *stock* for the benefit of the creditor. *ib.*

Vide FRAUDS.

DEBTORS, ABSENT AND ABSCONDING.

Vide ABSENT AND ABSCONDING DEBTORS.

DEBTORS, INSOLVENT.

Vide INSOLVENT DEBTORS.

DECLARATION.

Vide PLEADING, 1.

DEED.

- I. *Consideration of deed.*
- II. *Reservation or exception in a deed.*
- II. *When a deed is valid, and how it may be avoided.*

I. *Consideration of a deed.*

1. Parol evidence is admissible to show that the consideration expressed in a deed to have been received by the grantor, was not, in fact, paid to him. *Bowen v. Bell*, 338

II. *Reservation or exception in a deed.*

2. *W.* being seised of land, he, together with his wife, for the consideration of 500 dollars, conveyed the same to their son, his heirs and assigns, forever; reserving to themselves the use of the premises during their natural lives: *Held*, that the deed could not operate as a *reservation* or *exception* in favor of the wife, who had survived *W.*; but

that it was valid and effectual as a covenant, to stand seised to the use of the grantor himself, during life, and, after his death, to the use of his wife, for life. *Jackson, ex dem. Wood, v. Stuart*, 85

III. *When a deed is valid, and how it may be avoided.*

3. A mere failure of a consideration is no defence *at law*, against a deed or specialty. *Parker v. Parmele*, 130
4. It is essential to the validity of a deed, that the grantee is willing to accept it; and though such acceptance will be presumed, from the beneficial nature of the transaction, when the grant is not absolute, yet this presumption is very slight, where the grantee receives no benefit under the deed, but is subjected to a duty, or the performance of a trust. *Jackson, ex dem. Pintard, v. Bogle*, 184
5. Where *P.*, an insolvent debtor, in *New-Jersey*, in 1796, assigned all his property, under the insolvent act of that state, to *C* and *D.*, in trust for all his creditors, and there was no evidence that the trustees had taken the oath required of them by the act; and they had done no act whatever, in execution of the trust, for above twenty years; and one of them had declared, in the presence of the other, who did not dissent, that he had never qualified, nor acted, and never intended to act as trustee: *Held*, that this was sufficient evidence, that they never had consented to become trustees, or accepted the deed of assignment, by which, therefore, nothing passed. *ib.*
6. No person but the party to a deed who alleges the fraud to have been practised upon him, or those claiming title under him, will be allowed to impeach or avoid the deed, on that ground. *Jackson, ex dem. Hungerford, v. Eaton*, 478

Vide CITIES. USE. POWER.

Registry of deeds. *Vide* MILITARY BOUNTY LANDS.

DEVISE.

E. died in September, 1798, having, by his last will, dated August 20th, 1798, devised lands to his son *Joseph*, in fee, and other lands to his other son *Medcraf*, in fee, and adding "It is my will, and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his share or right shall go to the survivor; and, in case of both their deaths, without lawful issue, then I give all the property, &c. to my brother, *John E.*, of, &c., and my sister *Hannah J.*, of, &c., and their heirs." *Joseph*, one of the sons, died in August, 1812, without lawful issue, leaving his brother, *M.*, surviving, who, afterwards, on the 26th of July, 1819, also died, without lawful issue: *Held*, that on the death of the testator's son *Joseph*, the limitation over, which was good as an *executory devise*, vested in *M.*, the sur-

viving son; and the devise, in his favor, having taken effect, ceased to be executory, and he became seised in fee tail, by necessary implication of law, with a remainder expectant, in favor of *John E.* and *Hannah J.*, the brother and sister of the testator; and, by virtue of the statute of the 22d of February, 1786, abolishing estates tail, *M.* became seised in fee simple absolute, of the estate devised to his brother *Joseph*.
Lion ex dem. Eden, v. Burtiss, 453

DISCONTINUANCE.

Vide PLEADING.

DOWER.

- I. *Action.*
- II. *Assignment of dower.*

I. *Of the action.*

1. In dower, *unde nihil habet*, it is not a matter of course to grant a *view* to the tenant, but he must show sufficient cause by affidavit, to enable the court to judge of its necessity. *Ostrander v. Kneeland,* 276

II. *Assignment of dower.*

2. The right to dower, until it is duly admeasured and assigned, cannot be aliened, so as to enable the grantee to maintain an action for it, in his own name. *Jackson v. Aspell,* 411
3. And if a *surrogate*, at the instance of a purchaser of the widow's right of dower, has it admeasured and assigned to him, the proceeding is *coram non judice*, and confers no title, under the statute, even though the heir or his guardian consented to it. *ib.*

DUELLING.

The act to suppress duelling, passed November 5, 1816, (sess. 40. ch. 1.) which declares, that any person convicted of challenging another to fight a duel, &c. "shall be incapable of holding, or being elected to any post of profit, trust, or emolument, civil or military, under this state," is constitutional; and a conviction and judgment of disqualification under it, a, therefore, legal and valid. *Barker v. The People,* 457

Vide ATTORNEYS, COUNSELLORS, AND SOLICITORS.

E.

EJECTMENT.

Re-entry for non-payment of rent.

A lease for lives, contained a clause of re-entry for non-payment of rent, or, if the lessee should leave the possession for six months, or not perform the covenants, &c.; the tenant left the premises in 1810, and the landlord, in April, 1811, executed another lease

to the defendant, who entered and took possession of the premises; and the first lessee, who had paid no rent to his landlord, after the first of May, 1819, brought an action of ejectment, in 1821, against the defendant, to recover the possession: *Held*, that the right of the tenant, the first lessee, could be barred only by a recovery in ejectment, under the statute; and that if a *legal re-entry* was to be presumed, it would be a re-entry under the statute, rather than at common law; but that, in the absence of any record or evidence of a re-entry and recovery, by ejectment, under the statute, such re-entry could not be presumed; and that a re-entry at common law was not to be presumed, unless after a possession for fourteen years, at least; and, admitting that the landlord entered six months after his tenant had quitted the possession, that alone could not divest the apparent right of possession gained by the tenant. *Jackson, ex dem. Myers, v. Elsworth,* 180

ERROR.

Vide COURT OF ERRORS. COURT OF COMMON PLEAS.

ESCAPE.

Vide SHERIFF.

ESTATE TAIL.

Vide DEVISE.

EVIDENCE.

- I. *Deeds.*
- II. *Parol evidence to explain, vary, or contradict written instruments.*
- III. *Confessions or declarations.*
- IV. *Witness.*

I. *Deeds.*

1. A sheriff's deed is not admissible evidence, without showing the judgment and execution under which he sold the land. *Bowen v. Bell,* 338
2. A sheriff's deed is, *per se*, evidence of title in the grantee; but it may be set aside, on motion of the debtor, or a judgment creditor, on the ground of fraud in the sale. *Jackson, ex dem. Feeter, v. Sternberg,* 49

Vide DEED.

- II. *Parol evidence to explain, vary, or contradict written instruments.*

3. Parol evidence is admissible to show, that the consideration expressed in a deed to have been received by the grantor, had not, in fact, been paid to him. *Bowen v. Bell,* 338
4. Parol evidence is inadmissible to contradict the recital in a sheriff's deed, or to show that the land was sold under a different judgment and execution than those recited in the deed. *Jackson, ex dem. Feeter, v. Sternberg,* 49
5. But parol evidence may be admitted to show a fraud in the sale. *ib.*

6. Where a joint bond is given for the performance of covenants, a *parol* discharge of one of the obligors, without consideration, is not a discharge of the bond, nor can it be given in evidence under the general issue. *Dewey v. Derby and others*, 462

III. Confessions and declarations.

7. Where the plaintiff had, previous to the suit, assigned his interest in the debt, or *chose in action*, of which the defendant had notice, evidence of *confessions* subsequently made by him, as to the demands of the defendant against him, which might impair the interest so assigned, or prejudice the rights of the assignee, for whose benefit the suit was prosecuted, is inadmissible. *Frear v. Evertson*, 142

Vide WITNESS.

IV. Witness.

8. One of two lessees, after the lease has expired, is a competent witness to show that he had no beneficial interest in the lease, but joined in the execution of it, merely as a surety for the payment of the rent by his co-lessee. *Jones v. Clark and another*, 51
9. An endorser of a promissory note, in a suit against the maker, is a competent witness to prove that it was given to the plaintiff to take up two other notes endorsed by the witness to the plaintiff, and on which two notes the plaintiff had received more than the legal rate of interest. *Tuthill v. Davis*, 285
10. Where the plaintiff had, previous to the suit, assigned all his interest in the debt, or *chose in action*, he cannot be a witness for the defendant, to prove the demands of the defendant against him, by way of set off, or to prejudice the rights of his assignee. *Frear v. Evertson*, 142
11. A party to the record cannot be a witness, unless by consent of the real party in interest. *ib.*
12. A party in interest may be a witness to prove the *loss* of the note or instrument, on which the suit is brought, in order to introduce *parol* proof to the jury, of the contents of such note or instrument. *Chamberlain v. Gorham*, 144
13. A person who has executed a deed, set up by the defendant in ejectment, is not a competent witness, to prove it fraudulent, especially after the lapse of 26 years, when, by avoiding the deed, the recovery would enure to the common benefit of the plaintiff and the witness. *Jackson v. Eaton*, 478

Vide BILLS AND PROMISSORY NOTES. EJECTMENT. PARTNERSHIP.

EXECUTION.

Fieri facias; title of the purchaser of lands under a *fi. fa.*

1. Where land of a debtor is sold under an execution, pending a lease by the debtor, and

before the rent has accrued, and a certificate is given to the purchaser, pursuant to the statute, passed April 12th, 1820, (sess. 43. ch. 184.) the debtor, notwithstanding the sale and certificate, is entitled, until the time of redemption, allowed by the statute, has expired, and the sheriff's deed executed, to receive and sue for the rents which have, in the mean time, accrued; for the possession and enjoyment of the land, after the sale, and until the time of redemption has expired, remains in the same state as before the sale. *Bissell v. Payn*, 3

2. The sheriff's deed, in such case, does not retrospect, but must be dated after the time for redemption has expired. *ib.*
3. Such a sale is conditional merely, and until the sheriff's deed is executed, the purchaser has a *lien* only on the land. *ib.*

Vide PRACTICE. FRAUDS. DEBTOR AND CREDITOR.

EXECUTORY DEVISE.

Vide DEVISE.

EXTINGUISHMENT.

Vide RENT.

EXECUTORS AND ADMINISTRATORS.

1. Though an action will not lie against executors or administrators, for a fraud of the testator or intestate, which does not benefit the *assets*; yet it will lie against his representatives, on a contract fraudulently performed by him. *Troup v. Executors of Smith*, 33
2. In an action brought by an administrator for a debt due to his intestate, the defendant cannot *set off* a debt due from the intestate, purchased by the defendant after the death of the intestate. *Root v. Taylor*, 137

F.

FACTOR.

The plaintiff, a merchant in *New-York*, consigned goods to the master of a vessel, bound to the *Havana*, for sale. The master, on his arrival at *H.*, delivered the goods to the defendant's commission merchants there, for sale: *Held*, that the master, having no authority to pledge the goods for his own account, the defendants, by receiving them, with the knowledge that they belonged to the plaintiff, became substituted, as his factors or agents, in place of the master, and were accountable for the proceeds of the goods to the plaintiff; and could not retain them for any advances made by them to the master, or for a balance of account arising from transactions between them and the master. *Buckley v. Packard and others*, 421

FINE.

- A person holding land by *deforcement*, merely, cannot levy a fine, so as to affect or bar a stranger to it. *Lion, ex dem. Eden, v. Burtiss*, 483

FISHERY.

1. The fishery in *Salmon River*, in the county of *Oswego*, emptying into *Lake Ontario*, belongs, exclusively, to the owners of the adjacent land. *Hooker v. Cummings*, 90
2. In rivers which are *navigable*, that is, as far as the tide ebbs and flows, the right of fishing, as well as of navigation, is *common* to all; but in rivers not navigable in that sense, or above the flow and reflow of the tide, the proprietors of the soil have the *exclusive* right of fishing opposite to their land to the middle of the river. *ib.*

FIXTURES.

Vide CHATTELS.

FRAUDS.

Fraudulent conveyances.

1. A conveyance, by a person indebted at the time, without any actual consideration, absolute on the face of it, but intended to enable the grantee to sell the land and pay the debts of the grantor, rendering the surplus, if any, to him, is fraudulent and void, as against creditors. *Jackson, ex dem. Sherrill, v. Brush*, 5
2. Though a debtor, in failing circumstances, may lawfully prefer one creditor, or one set of creditors, to another, and in a deed of assignment of his property, in trust, for creditors named in a schedule, may reserve out of the trust property, a certain sum for the support of himself and family, for a limited time, and for paying the expenses of suits against the assignor, in relation to the trust, and of endeavoring to procure the discharge of the assignor; yet, if the deed of trust contains a *proviso*, that in case any of the creditors named should not, within the time limited in the deed, which contained a release of the debtor from his debts, become parties to it, the shares or proportions of such creditors, so neglecting or refusing to execute the deed, should be paid by the trustees to the assignor himself, the deed is fraudulent and void, under the statute. *Austin v. Bell*, 442
3. And a judgment creditor, who has refused to become party to such deed, may, before the time limited by the creditors to come in and execute it, take the property in the possession of the trustees by execution, and sell the same, in satisfaction of his debt. *ib.*
4. The plaintiff, in an action of ejectment, is a creditor, within the meaning of the statute of frauds; and may maintain an action of debt under the *fourth* section of the statute, to recover the amount of a *bond*, executed by the defendant, on which a judgment was entered and execution issued, with intent to

defraud his creditors. *Wilcox, qui tam, &c., v. E. and B. Fitch*, 472

5. A *qui tam* action on the *fourth* section of the statute of frauds, which gives a moiety of the sum recovered to the people, and the other moiety to the party aggrieved, is not within the statute of limitations, and may be brought at any time. *ib.*

Vide LIMITATION OF ACTIONS.

G.

GAOL LIBERTIES.

Vide SHERIFF.

GOVERNMENT.

Although the convention of delegates of this state, on the 9th of *July*, 1776, adopted the declaration of independence, and there were committees, or temporary bodies of men, who took charge of the public safety, there was no regular organized government, or any executive, legislative, or judicial authority of the state, until the adoption of the *constitution* on the 20th of *April*, 1777. *Jackson, ex dem. Russell, v. White*, 313

H.

HEIR,

1. Heirs being liable to creditors of their ancestor, in respect to lands descended to them, no alienation by them, after suit brought, can protect them, or the purchaser. *Covell v. Weston*, 414
2. But where the land is sold by order of the court of probates, or a surrogate, on the application of the executor or administrator, for want of sufficient personal assets, under the statute, (*sess. 36. ch. 79. s. 23, 24, 25. 1 N. R. L. 444. 451.*) such sale being declared valid and effectual against the heirs and devisees, and all persons claiming by, from, or under them, is, also, valid and conclusive against a creditor who had brought his action against the heirs, and may be pleaded in bar of the action. *ib.*
3. Such creditor, by bringing his action against the heirs, does not acquire a *lien* upon the land descended to them; his *lien* is merely on the heirs, in respect to the land descended, so that they cannot aliene it, after the action brought, and defeat his claim. *ib.*
4. The heir of an intestate takes the land of his ancestor, subject to the right of the administrator, to apply to a court of probates, or surrogate, for the sale of it, in order to pay the debts: and when the power given by the statute to the court of probates, or surrogate, for that purpose, has been executed, the title of the heir is gone, and he has nothing by descent. *ib.*

HIGHWAYS.

Public Rivers.

Rivers are to be considered *navigable* as far as the sea ebbs and flows; and, so far, the right of fishing, as well as of navigation, is *common* to all: and in rivers not navigable, in that sense, or above the flow and reflow of the tide, the proprietors of the adjoining soil have the exclusive right of fishing, opposite their land, to the middle of the river; but the public have an *easement*, or servitude, in such rivers, as highways, for passing and repassing in boats, &c. And all rivers which are, in fact, navigable, whether above the flow of the sea, or whether unaffected by the tide in their whole extent, are, in regard to their use, *public* rivers, and subservient to the public use and accommodation, and subject to regulation by the legislature. *Hooker v. Cummings*, 90

I.

INDIANS.

- 1 The *Indian* tribes, within this state, are subject to the jurisdiction and laws of the state. *Jackson, ex dem. Smith, v. Goodell*, 188
- 2 P. in error, 693
2. A patent for land to J. S., an *Oncida Indian*, and his heirs and assigns forever, is to him and his *Indian* heirs, whatever their civil condition and character may be, whether aliens or citizens. *Goodell v. Jackson*, in error, 693
- 3 Such a patent is to be taken as issued by due authority, and as equivalent to a legislative grant to J. S. and his *Indian* heirs. *ib.*
- 4 The *Indians* within this state are not *citizens*; but distinct tribes or nations, living under the protection of the government. *ib.*
Contra S. C. 188
5. No white person can lawfully purchase any right or title to land from any *Indian* or *Indians*, without the authority and consent of the legislature. 693
6. A deed, therefore, executed in 1797, by the son and heir of J. S., an *Indian* patentee of land, to a citizen, in the usual form, without any such consent, is illegal and void. *ib.*
Contra S. C. 183

INSOLVENT DEBTOR.

1. If the specification of the cause, and consideration of the debts due, and owing by an insolvent debtor, set forth in his inventory, pursuant to the statute of the 23th of *February*, 1817, (sess. 40. ch. 53.) fairly apprizes the creditors of the general ground of indebtedness, so as to give them a clue to inquiry, it is sufficient. *Taylor v. Williams*, 21
- 2 If the *certificate* of assignment states, that the insolvent had assigned "all his estate,

both in law and in equity, in possession, reversion, and remainder," it is sufficient. *Roosevelt v. Kellogg*, 238

3. If the certificate of discharge does not except *foreign* creditors, it does not affect the validity or affect of it, as against creditors here. *ib.*
4. Where the insolvent act was in force when the contract was made, the discharge under it exonerates both the person and estate of the insolvent. *ib.*
5. Of the plea of discharge, when good, &c. *vide* PLEADINGS.
6. An act *emendatory* of the insolvent act of *April*, 1813, passed subsequent to the judge's order for publication, but prior to the debtor's assignment, does not affect the proceedings; as such act applies only to cases in which the application for relief was made after it was passed. *ib.*

Vide PLEADING.

INSURANCE

- I. *Warranty of neutrality.*
- II. *Ship; seaworthiness.*

1. *Warranty of neutrality.*

1. Insurance by the defendants on a cargo at and from *New-York* to *Havana*, and at and from thence to *Laguaira* and *Porto Cabello*, or either of them, warranted *American* property. The cargo, consisting of flour and pork, was purchased of the plaintiff, a native *American* citizen, by L., a *Danish* citizen of *St. Thomas*, then in *New-York*, under a contract entered into here, by which the plaintiff engaged to deliver the cargo to L. at *Havana*, *Laguaira*, or *Porto Cabello*, at five per cent. advance on the invoice, or cost, and the freight and premium of insurance to be paid by the plaintiff. The cargo was consigned by the plaintiff to *Spanish* merchants at *Havana*, designated by L., with instructions to dispose of the cargo for the plaintiff's account, &c., or to send it to another market, that is, to a windward port. The bill of lading expressed, that the cargo was shipped for the account and risk of the plaintiff, to be delivered at *Havana* to H. & C., or their assigns, paying no freight, it being the property of the owner of the vessel, (the plaintiff.) On the arrival of the vessel at the *Havana*, the consignees interlined the bill of lading with the words "or market," and directed the master to proceed to *Laguaira*, and, while proceeding to *Laguaira*, she was captured by a *Venezuelan* privateer, carried into a port in the island of *Margarita*, and the cargo there libelled and condemned as prize, &c.: *Held*, in an action on the policy, that the cargo was, and remained the property of the plaintiff, until its delivery at one of the places mentioned that there was no delivery or acceptance of it at *Havana*; and that the consignees, in directing the master to proceed to *Laguaira*, acted as agents of the plaintiff, who continued owner of the cargo until its capture; and that, therefore, the warranty was com-

plied with. *De Wolf v. New-York Firemen Insurance Company*, 214

2. Such a contract of sale being legal, by the municipal law of this country, as well as by the law of nations, does not affect the *neutral* character of the property. *ib.*
- 3 The plaintiff was not bound to disclose to the defendants the facts and circumstances of the contract, even if they were material; for the insured is not obliged to communicate any fact, as to which there is a warranty, express or implied. *ib.*

II. Ship; seaworthiness.


4. A policy of insurance contained a clause, "that if the vessel, upon a regular survey, should be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage, on account of her being unsound or rotten, the assurers should not be bound to pay their subscription." The declaration stated, that "by storms, winds, tempestuous weather, and by the perils and dangers of the seas, the vessel became leaky, and was greatly broken and damaged, and upon her arrival at S., upon a survey, duly had upon her, she was found injured in her timbers and planks, and, inasmuch as she could not receive her necessary repairs there, nor safely proceed to sea to procure repairs elsewhere, she was condemned and sold &c., whereby she became wholly lost," &c. The defendant pleaded in bar, admitting the arrival of the vessel at S., and that a survey was made, &c.; but setting forth the survey more fully, by which it was found, "that a great part of her timbers and planks, from the stern-post to the stem of the ship, on both sides, were entirely rotten," &c.: *Held*, that as the plea admitted the cause of action as stated in the declaration, and set up new matter in avoidance of the action, which the plaintiff was not bound to prove, and which involved a question of law, on which the defendant was entitled to the judgment of the court, the plea was good on demurrer. *Brandagee v. National Insurance Company*, 328
5. It is sufficient, in such a case, if the survey state particular facts, from which the conclusion of rottenness and unsoundness is drawn, and for that cause alone she is declared unseaworthy, or incapable of proceeding to sea. It is not necessary, that the survey should follow the exact words of the policy. *ib.*

INTEREST

Vide BILLS AND PROMISSORY NOTES.

J.

JUDGMENT

 *Priority of judgments.*
Satisfaction of judgments
 540

I. Priority of, and setting aside a judgment, or staying execution thereon.

1. The court will not set aside a judgment entered up on a bond and warrant of attorney, or stay execution thereon, on the ground of fraud, at the instance of a creditor at large, or whose debt has not been legally ascertained by judgment. *Wintringham v. Wintringham*, 256

II. Satisfaction of a judgment.

2. Where a judgment is fully paid, and the plaintiff, on application of the defendant, refuses to acknowledge satisfaction, the court will compel him to enter satisfaction at his own expense, and to pay the costs of the motion. *Briggs v. Thompson*, 214

JURISDICTION.

Vide COURT, SUPREME. CITIES.

L.

LANDLORD AND TENANT.

Vide ATTORNMEN. CHATTELS.

LEASE.

Vide MORTGAGE. EVIDENCE, IV. EJECTMENT

LIBEL.

Vide PLEADING. BAIL.

LIMITATION OF ACTIONS.

1. Where, to an action of *assumpsit* for negligence, want of skill, and fraud, in the performance of work, the defendant pleads the statute of limitations, the plaintiff cannot reply a fraudulent concealment of the badness of the work, by the defendant, so that the plaintiff did not discover the fraud until within six years before the commencement of the suit, so as to deprive the defendant of the protection of the statute. *Troup v. Smith's Executors*, 33
2. To an action for a *deceit*, the defendant pleaded not guilty within six years, on which issue was joined: *Held*, that proof of an acknowledgment of the fraud within six years, did not support the issue, or take the case out of the operation of the statute of limitations. *Oothout v. Thompson*, 277
3. A party having a right to land, has, in every event, twenty years to make an entry: and, if under legal disability when his right of entry first accrued, he may, though twenty years have elapsed, bring his action within ten years after his disability is removed. *Jackson, ex dem. Corson, v. Coles*, 301
4. A *qui tam* action on the fourth section of the statute of frauds, (sess. 10. ch. 44.) which gives a moiety of the sum recovered to the people, and the other moiety to the party aggrieved, is not within the statute of limitations. *Wilcox, qui tam v. Fitch*, 472

- 5 Where there is a joint purchase of goods, and one of the purchasers takes the whole goods, and agrees to account to the other for his share of them, or the net proceeds, and to charge no commissions in case of sale, this is not "a trade of merchandise between merchant and merchant, their factors and servants," within the meaning of the exception in the statute of limitations. *Murray v. Coster*, in error, 576
6. And where a bill in equity was filed for an account, against the party who had received and sold the goods, after the lapse of six years, the statute of limitations was held to be a good plea in bar; for it is not the case of a technical *trust*, of which the Court of Chancery has peculiar and exclusive jurisdiction; nor is the defendant, in that sense, to be considered as a trustee; for the plaintiff has a perfect remedy at law against him. *ib.*
7. The statute, in such case, begins to run from the time the plaintiff demanded of the defendant his share of the goods, or the proceeds; and the defendant having rendered an account of sales, the right of action was then perfect. *ib.*
8. But where the defendant, in his answer accompanying his plea of the statute of limitations, admitted that he had not been called upon to pay the plaintiff his proportion of the proceeds, during six years prior to the suit; and that, to avoid litigation, he had, through his counsel, offered to pay the plaintiff his share of the proceeds, without interest; but, at the same time, insisted he was discharged, by length of time, from all liability, and expressly reserving his right to avail himself of the statute of limitations, in case his offer of settlement was refused: *Held*, that this was such an acknowledgment and admission of the debt, as defeated the operation of the statute. *ib.*

M.

MASTERS AND OWNERS OF VESSELS.

1. Though the part-owners of a ship are, generally speaking, tenants *in common*, yet there may be a special partnership between them in the ship, as well as in the cargo, in regard to a particular voyage or adventure, and in the proceeds arising from the sale of them, and the profits of the voyage. *Mumford v. Nicoll*, in error, 611
2. Where, in such a case, one of two owners receives, or gets possession of the whole proceeds, he has a right to retain them, until he is paid or indemnified for what he has advanced or paid more than his share, for outfits, repairs or expenses of the vessel, for the particular voyage or adventure, but not for a general balance of account, arising from former and distinct voyages and adventures, in which they have been concerned together, in the same or other vessels; there being no general partnership between them, and each adventure creating a special partnership, by itself, and terminat-

ing with the particular adventure. *Mumford v. Nicoll*, in error, 611

Vide FACTOR.

MILITIA.

Vide COURTS MARTIAL.

MILITARY BOUNTY LANDS.

1. The act of the 14th of *April*, 1820, (sess. 43. ch. 245.) relative to deeds for military bounty lands, does not apply to the case where the subscribing witnesses to the deed are produced at the trial, to prove its execution, or where such evidence is there offered, as is competent to prove its execution at common law. *Jackson, ex dem. Hungerford, v. Eaton*, 478
2. A deed, therefore, which has not been proved, or acknowledged, and recorded, according to the first section of the act of *April* 12th, 1813, (sess. 36. ch. 97.) on being proved at the trial, by evidence competent at common law, may be read in evidence. *ib.*
3. A *deposit* of deeds and conveyances, pursuant to the "act for registering deeds and conveyances, relating to military bounty lands," passed *January* 8th, 1794, (sess. 17. ch. 1. s. 1. 2 *N. R. L.* 262.) and the act to amend the same, *March* 27th, 1794, (sess. 17. ch. 44.) in the office of the clerk of the county of *Onondaga*, is not *legal* notice to subsequent purchasers; nor is it equivalent, in that respect, to a *registry*. *Wendell v. Wadsworth*, in error, (59)

Vide POWER.

MORTGAGE.

Estate of mortgagor and mortgagee.

A tenant of a mortgagor, in possession, after the mortgage has become forfeited, during the continuance of the lease from the mortgagor, may *attorn* to and take a lease from the mortgagee: and, in an action brought by the mortgagor, for rent, under his lease, may set up such *attornment*, as a legal defence. *Jones v. Clark*, 51

N.

NOTICE.

Vide MILITARY BOUNTY LANDS.

Notice accompanying the plea of the general issue. *Vide* PLEADING, II.

NUNCUPATIVE WILL.

Vide WILL.

O.

OATHS.

Vide ATTORNEYS, COUNSELLORS, AND SOLICITORS.

OWNERS OF VESSELS.

Vide MASTERS AND OWNERS OF VESSELS.

P.

. PARTNERSHIP.

A witness, a commission merchant, in *New-York*, testified, that he became acquainted with, and did much business for a merchant in *Antigua*, and understood, in the course of his business, and from general report, that he was a partner in a house or firm, in *London*, on whom he had drawn a bill of exchange, though the witness had not known or heard of the drawer or the drawee, until more than six months after the bill was drawn: *Held*, that this was sufficient evidence, *prima facie*, to show that the drawer was a partner in such firm. *Gowan v. Jackson*, 176

Vide TENANTS IN COMMON

PLEADING.

- I. Declaration.
- II. Plea.
- III. Replication.
- IV. Rejoinder.
- V. Surrejoinder.
- VI. Demurrer.
- VII. Pleading in trespass.

I. Declaration.

1. Averments by way of inducement, in the first count of a declaration, will aid a subsequent count, which would otherwise be defective, when it clearly refers to the first count, which is good. *Crookshank v. Gray*, 344

II. Plea.

2. A notice accompanying a plea of the general issue, need not be as precise and particular as a special plea. *Chamberlain v. Gorham*, in error, 746
Contra S. C. in Supreme Court, 144
3. It is sufficient, if it contain such a statement of the special matter, to be given in evidence at the trial, as may prevent the plaintiff from being taken by surprise. 746
4. Where several defendants to an action of debt, have joined in pleas in bar, one of them cannot, afterwards, sever, and put in a plea, going to his personal discharge. *Andrus v. Waring*, 153
5. A discharge, under the insolvent act, of a defendant who had executed a bond as a surety for a deputy sheriff, is not a good plea in bar; as the damages sustained in consequence of the breaches of the condition of the bond, were not ascertained. *ib.*
6. A plea to a declaration for a libel, justified as to part of the libel charged, but did not profess to answer the whole, though it prayed judgment of the action generally: *Held* that the plaintiff might demur to such defence.

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tive plea; and that, by so doing, he did not discontinue his suit. *Sterling v. Sherwood*, 204

7. In a plea of a discharge under the insolvent act, it is sufficient, after stating enough to give jurisdiction to the judge, or officer granting the discharge, to say, *that such proceedings were thereupon had, &c.*, that the judge granted the discharge, and setting it forth *verbatim*. *Roosevelt v. Kellogg*, 208
8. If the plea states the insolvent was a *resident* of the county in which the application was made by him, it is tantamount to saying, that he was an inhabitant of that county. *ib.*
9. If the plea states, that the judge was satisfied that the insolvent had conformed, in all things required of him by the act, before the assignment was directed, that is sufficient, without alleging particularly, that an advertisement was published requiring all his creditors to show cause, &c. *ib.*
10. Though a matter of defence, arising after the commencement of the suit, cannot be pleaded in bar of the action generally; yet it may be pleaded in bar of the *further maintenance* of the suit. *Covell v. Weston*, 414
11. A judgment recovered since the action was brought, may be pleaded by executors, in bar of the action. *ib.*

Vide ACCORD AND SATISFACTION. COVENANT.
INSURANCE.

III. Replication.

12. Though a replication must not depart from any material allegation in the declaration, yet, where the plea is evasive, the plaintiff may avoid the effect of it, by restating his cause of action with more particularity and certainty, and thus meet and thwart the particular defence set up. *Troup v. The Executors of Smith*, 33

Vide LIMITATION OF ACTIONS.

13. Where, to a declaration in *assumpsit*, on a promissory note, the defendant pleaded, that before the note was given, the plaintiffs, falsely and fraudulently, represented themselves to the defendant as owners of 400 acres of land, which they offered to sell to the defendant for 2,000 dollars, and the defendant, confiding in those representations, purchased the land at that price, and paid half of it, and gave a bond and mortgage, and the note in question, for the residue; and averring that the plaintiffs were not the owners of the land, nor had any title to it, nor any authority to convey, &c.; the plaintiffs *replied*, "that they did not, nor did either of them, at or before the making the note, falsely and fraudulently represent themselves as owners of the land," and concluded to the country: *Held*, that the several matters alleged in the *plea*, constituting one entire defence, and forming one connected proposition, the *replication*, as it denied the substantial and material allegation in the

plea, to wit, the fraudulent representations of the plaintiff, was good, on demurrer; for none of the other allegations furnished any defence to the action. *Bradner v. Demick*, 404

IV. Rejoinder.

- 14 To a declaration in debt on the penalty of a bond, executed to the plaintiff, as sheriff, conditioned that *W.* shall well and duly perform the office of a deputy sheriff, &c., and render a just and true account of all business that shall come to his hands, &c., though *non damnificatus* be not a good plea, yet, after pleading such a plea, the defendant cannot *rejoice*, confessing and avoiding the action, for that would be a *departure*, and the rejoinder would be bad on general demurrer. *Andrus v. Waring*, 153
15. A rejoinder, in answer to a breach assigned in the replication, of negligence in *W.*, as deputy, in the execution of process, &c.; that he was removed by the plaintiff from his office of deputy, without alleging that such discharge was *under seal*, is bad. *ib.*
16. So, where the breach assigned in the replication was, that the deputy, on the arrest of a defendant on mesne process, took a bail-bond, and that no appearance was entered, or special bail filed, and the bail to the arrest was insolvent, and wholly insufficient, by reason whereof, the plaintiff was obliged to pay, &c.; a *rejoinder*, that the bail to the arrest had, at the time, sufficient in the county to answer, and was good and responsible, is bad. *ib.*
17. And if, instead of demurring to such a rejoinder, the plaintiff *surrejoins*, that the bail taken was insolvent and insufficient, and through the negligence of the deputy, no special bail was filed, &c., taking issue thereon, this is not a departure, but the surrejoinder is good. *ib.*

Vide VII. 22.

V. Surrejoinder.

18. Where, in an action on a bond given to the plaintiff, as sheriff, as security for *W.*, his deputy, the breach assigned in the replication was, that after the bond was given to the plaintiff, and while *W.* was a deputy sheriff, a writ of *fi. fa.* &c. was delivered to him, and by his negligence and default in not returning it, &c. the plaintiff was compelled to pay a large sum of money, &c.; and the *rejoinder* alleged, that before the issuing the *fi. fa.*, *W.* was removed by the plaintiff from his office as deputy, and that the writ did not come to the hands of *W.* until after he was removed; and the plaintiff *surrejoined*, that the writ was delivered to *W.*, as deputy, while he continued to exercise the office of deputy sheriff, and was a deputy of the plaintiff, tendering issue thereon: *Held*, on special demurrer, that the surrejoinder was good. *Andrus v. Waring*, 153
19. Where, to a similar breach assigned to the replication, the defendant *rejoined*, that the

writ was delivered to *W.* previous to the execution of the bond to the plaintiff, and while *W.* was deputy sheriff, by virtue of a previous appointment; and the plaintiff *surrejoined*, that the writ was delivered to *W.* while he was acting as deputy sheriff, and was deputy sheriff under the plaintiff. *Held*, on special demurrer, that the surrejoinder was bad, being evasive, and not answering the material allegations of the rejoinder, and tendering issue on an immaterial fact. *Andrus v. Waring*, 153

VI. Demurrer.

Vide PLEA.

20. Where a sheriff was sued for taking insufficient pledges in an action of *replevin*, and for taking no pledges; and there was a demurrer to one of the counts in the declaration, and issue joined on the other counts; and a judgment was given for the defendant, on the demurrer, and a verdict found for him on the issue, on which judgment was rendered: *Held*, that the defendant was not entitled to a writ of inquiry of damages, as he had sustained no damages in defence of his suit, except the costs. *Gibbs v. Bull*, 212

VII. Pleading in trespass.

21. Though a plea of *molliter manus imposuit* may justify a mere assault, it is no answer to a charge of beating, bruising, wounding and ill treating the plaintiff. *Gates v. Lounsbury*, 427
22. Where, to an action for assaulting, beating bruising, wounding, and ill treating the plaintiff, the defendant pleaded *molliter manus imposuit* on the plaintiff, to prevent him from taking the defendant's horse out of his possession, &c.; the plaintiff replied that the horse was wrongfully in his close, *damage feasant*, and he was leading him out of the close, towards a certain pound, with intent to impound him as a distress, &c., as he lawfully might do; and, thereupon, the defendant, *de son tort*, committed the trespass, &c. The defendant *rejoined*, that the plaintiff was leading the horse towards the pound, with intent to impound him as a distress, before he had made application to the fence-viewers of the town, to ascertain and appraise the damages, &c., as by the statute he was required to do, whereupon the plaintiff was a trespasser, *ab initio*, &c.: *Held*, that the rejoinder was bad, on demurrer. *ib.*

Pleading in covenant. Vide COVENANT.

POWER.

1. The doctrine, that a deed executing a power, generally speaking, relates back to the instrument creating the power, so as to take effect from the original deed, is a fiction of law for the advancement of right; and is not to be applied to the injury of a stranger by defeating his lawful intervening rights. *Jackson, ex dem. Henderson, v. Davenport*, in error, 537

2. *K.* being entitled to military bounty lands, by deed, dated *January 12, 1788*, for a valuable consideration, granted, bargained and sold to *B.* all the bounty lands to which he was entitled; and, in the same deed empowered *H.* and *G.*, or either of them, as his attorneys or attorney, for him, and in his name, to grant, bargain and convey the same lands to *B.*, *his heirs and assigns*, in case the same should be necessary, upon the grant having passed the great seal of the state to him, for such bounty lands. Afterwards, on the 8th of *July, 1790*, a patent, in the usual form, was issued to *K.*, the soldier, who, on the 25th of *February, 1792*, for a valuable consideration, by deed, granted, bargained and sold the same lands to *C.*, his heirs and assigns, forever. On the 9th of *February, 1802*, *H.*, as the attorney of *K.*, in his name, executed a *release in fee* of the land to *B.*, in pursuance of the powers contained in the first deed from *K.* to *B.*: *Held*, that the first deed from *K.* to *B.*; for want of words of inheritance, conveyed a life estate only to *B.*; and *K.* having, before the execution of the power, conveyed the reversion, for a valuable consideration, to *C.*, a *bona fide* purchaser, without notice of the prior deed, *C.* became seised of the legal estate, or reversion, on the death of *B.* *Jackson, ex dem. Henderson, v. Davenport*, in error, 537

POOR

- I. *How a settlement is gained.*
- II. *Appeals from orders of removal.*

I. *How a settlement is gained.*

1. By the statute, (sess. 36. ch. 88. 1 *N. R. L.* 201.) marriages, where one or both parties are slaves, are legal, and their issue legitimate; and where the wife is a free woman and the husband a slave, the children of such marriage follow the condition of the free mother, as to their civil rights; and the custody and control of them belong to the mother, as if the father were dead; and their settlement belongs to the town in which the mother had her last legal settlement, without regard to the slave husband. *Overseers, &c. of Marbleton v. Overseers, &c. of Kingston*, 1
2. Where a father gains a settlement in a town by the payment of taxes, for two years, his infant child, though not residing with him, or under his immediate charge or control, has a derivative settlement in the same town with his father. *Adams and others v. Oaks*, 282
3. A father, who has acquired a legal settlement in a town, cannot, by any deed, release, or act of emancipation, divest his son, who has not arrived at 21 years of age, nor acquired a settlement for himself, of his right of settlement derived from his father; though the son, since such deed of emancipation, had not resided in his father's family, but had acted, in all things, for himself, and worked entirely for his own benefit. *Adams and another v. Foster and another*, 452

II. *Appeals.*

4. Where an overseer of the poor, who had been summoned by two justices, to appear and answer to a complaint against him, for not taking care of a sick and lame pauper, upon request and notice, &c., according to the 16th section of the act for the relief and settlement of the poor, (1 *N. R. L.* 279. 294. sess. 36. ch. 78.) neglected to appear, or show cause, &c.; and the justices, thereupon, issued a distress warrant, to levy the amount of the expense of relieving and supporting the pauper, on the goods and chattels of the overseer, which was executed, accordingly: *Held*, that he had no right of appeal to the general sessions of the peace, such a judgment by default being equivalent to a judgment by confession. *Adams and others v. Oaks*, 282
5. After an order for the removal of a pauper from the town of *B.* to the town of *D.*, it was found that he was too sick to be removed, and he afterwards died in *B.*, so that the order was not executed; and the town of *B.* had taken no measures, under the sixteenth section of the act, (sess. 36. ch. 78. 1 *N. R. L.* 279.) against the town of *D.* to enforce, by warrant, the payment of the expense of maintaining the pauper in his sickness, and of his burial, though a notice had been sent by the overseers of the poor of *B.* to the overseers of *D.*, for that purpose: *Held*, that the overseers of the poor of *D.*, not being aggrieved by the order or the notice, within the meaning of the act, no appeal would lie by them to the Court of Sessions. *Adams v. Foster*, 452

PRACTICE.

- I. *Service of papers.*
- II. *Special orders and rules.*
- III. *Discontinuance, and nolle prosequi.*
- IV. *Commission to examine witnesses.*
- V. *Trial.*
- VI. *Reference.*
- VII. *Cases for argument.*
- VIII. *Entering, signing, filing and docketing judgment.*

I. *Service of papers.*

1. Service on a *Sunday*, of a notice of affidavit or other papers, which are to be the foundation of a motion for a rule, is irregular and void. *Field v. Park*, 14

II. *Special orders and rules.*

2. Where a rule on a judgment of the court on demurrer, gives a party leave to amend his plea within a certain specified time, on payment of costs, an order of a judge, at chambers, or of the recorder of the city, extending the time allowed by the court, is regular and void. *Van Ness v. Hamilton*, 1

III. *Discontinuance, and nolle prosequi.*

3. Where the husband and wife were jointly, on a bond executed by them jointly

the plaintiff, before plea, was allowed to enter a *nolle prosequi* as to the wife, and amend his declaration accordingly, as if the suit were against the husband alone, on payment of the costs of amendment. *Pell v. Pell*, 126

IV. Commission to examine witnesses.

4. A commission issued to take the examination of foreign witnesses, must be returned and delivered to a judge of the court, and actually filed in the clerk's office, before the depositions taken under it can be read in evidence. *Jackson, ex dem. Parker, v. Hobby*, 357
5. Where a commission was delivered by the agent, to a judge at *nisi prius*, who took his affidavit as to the manner of receiving it, after the cause was called, but before the trial was commenced: *Held*, that the depositions annexed to the commission, so opened by the judge, were not legal evidence. *ib.*

V. Trial.

6. It seems, that where counsel objects to evidence, or to the opinion of the judge, at the trial, he ought to state the grounds of his objection, so as to call the attention of the judge to the point of exception, and to afford the opposite party an opportunity of obviating it by additional proof. *Jackson v. Hobby*, 357

VI. Reference.

7. Proceedings in a cause before referees, will be stayed, on an affidavit of the absence of a material witness, who had gone out of the state, but was expected to return by a certain day. *Sudam v. Swart*, 476

VII. Cases for argument.

8. It seems, that the rule as to the service of a copy of a case, at or before the time of giving notice of the argument, does not apply to demurrer books. *Van Buskirk v. Burr*, 275

VIII. Entering, signing, filing and docketing of judgment.

9. The judgment roll, or record, must not only be signed, but actually filed with the clerk, before the plaintiff can take out execution. *Barris v. Dana*, 307

Vide COURT OF ERRORS. BAIL. JUDGMENT, 2.

PROMISSORY NOTES.

Vide BILLS OF EXCHANGE AND PROMISSORY NOTES.

R.

REFORMED DUTCH CHURCH.

The *classis* of *M.* (one of the ecclesiastical tribunals of the Reformed Dutch Church) deposed *W.*, a minister of that church, at *C.*,
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for immoral conduct; but, on appeal to the *synod*, (the highest tribunal of the church,) the decision of the *classis* was reversed. The *classis*, afterwards, passed various resolutions, at one time declaring, that *W.* should be considered as restored, and at another time, that he was deposed; but *W.*, in the mean time, continued to exercise his ministerial functions as usual: *Held*, that the decision of the *synod*, on the appeal, was conclusive, and that the subsequent proceedings of the *classis*, being irregular, could have no effect on that decision, by which *W.* was restored to the ministry; and that the relation of minister and congregation not being dissolved, *D.*, who had subscribed a certain sum for the support of the minister of the church, "as long as *W.* remained the regular preacher," was liable to pay the amount of his subscription. *Dieffendorf v. The Trustees of the Dutch Reformed Calvinist Church at C.* 12

RENT.

1. The acceptance of a bond for rent, is not an extinguishment of it; and it makes no difference whether it is reserved by deed or by *parol*; for rent issuing out of the *reality*, is of a higher nature than a simple contract. *Cornell v. Lamb*, 407
2. A landlord, therefore, who has received a sealed note for rent due on a *parol* demise, may maintain an action of *assumpsit* for use and occupation, on delivery of the note, at the trial to be cancelled. *ib.*
3. *Distrass* is a concurrent remedy for rent; and where the landlord has distrained, and sold the goods of the tenant, for part of the rent, he may maintain *assumpsit* to recover the residue. *ib.*

Vide CERTIORARI.

REPLEVIN.

Replevin lies at the suit of the owner of a chattel, against a sheriff, constable, or other officer, who has taken it from the servant, or agent of the owner, while in his employ, by virtue of an execution against such servant or agent; the actual possession, in such case, being considered as remaining in the owner. *Clark v. Skinner*, 465

Vide PLEADING, VI. 20.

RESERVATION OR EXCEPTION.

Vide DEEDS.

RIVERS.

Vide HIGHWAYS.

S.

SALE OF CHATTELS.

Warranty, express or implied.

1. Though, on the sale of goods or chattels, there is an implied warranty as to the title,
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yet the vendor is not answerable for their *quality or goodness*, unless there is an *express warranty or fraud*. *Swett v. Colgate*, 196

2. As, where the article sold was considered and described as *barilla*, and was examined by the vendee, before the sale of it at auction, and a sample exhibited at the sale, and the article was supposed to be *barilla*, and was purchased as such; but, afterwards, the vendee, on using some of it, in the manufacture of soap, discovered that it was not *barilla*, but *kelp*, which greatly resembles it, but is of very little or no value: *Held*, that there being no express warranty or fraud, on the part of the vendor, no action would lie against him, at the suit of the vendee, who had offered to pay for what he had used, and return the residue; and the bad quality of the article, therefore, was no defence to a suit brought by the vendor to recover the price for which it was sold. *ib.*
3. To constitute an *express warranty*, it is essential that the affirmation, at the time of sale, should be intended by the party as a warranty; otherwise, the affirmation is only judgment or opinion. *ib.*

SALMON RIVER.

Vide FISHERY.

SCIRE FACIAS.

1. Where a judgment creditor proceeds to enforce his *lien* on real estate, and it becomes necessary, for that purpose, to revive the judgment, he must make all the *terre-tenants* parties to the *scire facias*, in order that they may be compelled to contribute jointly to the payment and satisfaction of the judgment. *Morton's Executors v. Terre-tenants of Croghan*, 106
2. If, in such case, some of the *terre-tenants* appear and plead, and others make default, and the plaintiff enters a *nolle prosequi* as to those who appeared and pleaded, and takes judgment by default against the others, it is a *discontinuance* as to *all* the defendants; and he must pay *costs*, as in case of *discontinuance*. *ib.*
3. *Aliter*, in actions of *tort*, where the plaintiff has his election to sue jointly or severally; or, in *assumpsit* or *debt*, where one of the defendants pleads matter of personal discharge, which does not go to the action of the writ, as *bankruptcy* or *infancy*. *ib.*

SET-OFF.

In an action brought by an *administrator*, for a debt due to his intestate, the defendant cannot *set off* a debt due from the intestate, purchased by the defendant, after the death of the intestate. *Root v. Taylor*, 137

SHERIFF.

Liability of, and action against him.

1. Where a new sheriff is appointed, the prisoners remain in custody of the old sheriff,

until they are delivered to his successor *Hempstead v. Weed*, 64

2. If, therefore, the old sheriff omits to assign over to the new sheriff, a prisoner on execution, who has been permitted to go within the gaol liberties, on giving security for that purpose, this is not an *escape* for which the old sheriff is liable, as long as the prisoner remains within the limits. *ib.*
3. The right of the old sheriff to assign prisoners on civil execution, to his successor in office, being for his own security and benefit, may be waived by him; but the prisoners not delivered over, are to be deemed, to all intents and purposes, as in his custody; and, in case of actual escape, he will be liable. *ib.*
4. Where a sheriff's bond is sued at the instance of a party who has obtained judgment against the sheriff for his default, in an action on his bond, another party, who has, also, obtained a judgment against him for his default, on application to the court, is entitled to have the amount of such judgment levied on the execution to be issued against the sheriff and his sureties, on the judgment recovered against them on their bond, without having given previous notice to them of his motion for that purpose. *The People v. Birdsall and others*, 297
5. Interest on the judgment recovered by the party may be levied, together with the debt, and damages, and costs, if the judgment be such as carries interest under the statute. *ib.*
6. The party at whose instance a sheriff's bond is sued, may, after judgment against the sheriff and his sureties, move to have the amount of his original judgment, with interest, and costs, levied on the execution against the sheriff and his sureties, without any previous notice of a motion for that purpose. *The People v. Matthewson*, 300

Vide EVIDENCE, II. 4. EXECUTION. PLEADING, IV.

SHIPS AND VESSELS.

Vide ARREST OF SHIPS AND VESSELS

SLANDER.

- I. *For what words an action lies.*
- II. *Action and evidence.*

I. *For what words an action of slander lies.*

1. The words, "You have sworn to a lie," are not, in themselves, actionable; but if it be averred, that they were spoken of and concerning the plaintiff, and of and concerning a trial, and the evidence given by the plaintiff in a cause pending in a court, the count will contain a sufficient cause of action. *Crookshank v. Gray*, 344
2. When the words, charged as being slanderous, are proved to have been spoken in relation to a part of the evidence given by the plaintiff, as a witness in a cause, as to a particular fact, not material to the point at issue in the cause, they are not actionable. *ib.*

II. *Action and evidence.*

3. Where the words charged to have been spoken, impute to the plaintiff the crime of *perjury*, without any qualification or explanation, the defendant, to make out a justification, must prove that the plaintiff, in giving his evidence, *wilfully and corruptly* swore false. *McKinly v. Rob*, 351
4. It is not enough, to prove, that the facts sworn to by the plaintiff were not true, though it proceeded from mistake and misapprehension. *ib.*

Vide VARIANCE.

SLAVES.

Marriages, where one or both parties are slaves, are legal by the statute, (sess. 36. ch. 88.) and the issue legitimate. Where the wife is a free woman and the husband a slave, their condition is not changed by the marriage; but the children follow the condition of the mother, as to their civil rights, and the mother has the control and custody of them during infancy, as if the father were dead. *Marbletown v. Kingston*, 1

Vide POOR.

STATUTES.

To take private property for public use, without making just compensation to the party, is not only unconstitutional, as against a fundamental principle of government, but a violation of natural right and justice; a statute, therefore, which violates this principle, is null and void. *Bradshaw v. Rodgers*, 103

S C. in error, 735

Vide CANALS, AND CANAL COMMISSIONERS.

STATUTES CONSTRUED, EXPLAINED, OR CITED.

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| (787, Feb. 8, Sess. 10. ch. 13. (Usury,) | 290 |
| — Feb. 26, Sess. 10. ch. 44. (Frauds,) | 472 |
| 1798, Aug. 10, Sess. 22. ch. 1. (Ships and Vessels,) | 194 |
| 301, March 30, Sess. 24. ch. 87. (Champerty and Maintenance,) | 386 |
| 1813, Feb. 25, Sess. 36. ch. 4. (Jurors,) | 310 |
| — March 5, Sess. 36. ch. 24. (Immorality,) | 140 |
| — March 10, Sess. 36. ch. 35. (Constables,) | 74 |
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| — April 9, Sess. 36. ch. 86. (New-York—streets,) | 269. 495 |
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| 1813, April 12, Sess. 36. ch. 96. (Costs,) | 295. 499 |
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SURVEY OF SHIPS.

Vide INSURANCE.

T.

TENANTS IN COMMON.

Vide MASTERS AND OWNERS OF VESSELS.

TERRE-TENANTS.

Vide SCIRE FACIAS.

TITLE TO PROPERTY.

Vide ANIMALS FERE NATURE.

TRESPASS.

Where an act is lawfully done, it cannot be made unlawful *ab initio*, unless by some positive act incompatible with the exercise of the legal right to do the first act; the mere intention of doing a subsequent illegal act, is not sufficient to render the first act unlawful. *Gates v. Lounsbury*, 427

Vide PLEADING. CANALS, AND CANAL COMMISSIONERS. COVENANT.

TRUST.

Vide LIMITATION OF ACTIONS.

U.

USE.

A bargain and sale, for a pecuniary consideration, of a fee, to commence *in futuro*, will operate as a covenant to stand seised to the use of the persons within the consideration, according to the intention of the party, without any technical or formal words for that purpose. *Jackson, ex dem. Wood, v. Stuart*, 85

W. being seised of land, he, together with his wife, for the consideration of 500 dollars, conveyed the same to their son, his heirs and assigns, forever; "reserving to themselves the use of the premises, during their natural

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lives:" *Held*, that the deed could not operate as a reservation or exception in favor of the wife, who had survived her husband; but that it was valid as a covenant to stand seized to the use of the grantor himself, during life, and, after his death, to the use of his wife, for life. *Jackson, ex dem. Wood, v. Stewart*, 86

USURY.

What transactions are usurious.

Action to recover back the excess of interest, or on the statute.

I. What transactions are usurious.

A mere change of securities for the same usurious loan, to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. *Tuthill v. Davis*, 285

As, where a new note, without any new consideration, is given to take up a note in the hands of the original party to the usurious contract, it is tainted by the illegal consideration of the first note. *ib.*

A note made payable to A., or bearer, but never delivered to A., but passed by the maker to H., as security for a usurious loan, is usurious and illegal in its inception. *Marvin v. M'Callum*, 288

Action to recover back the excess of interest, or on the statute.

A borrower, who has paid more than the legal rate of interest, is not confined to the remedy given by the statute to prevent usury; but may bring *assumpsit* for money had and received, at common law, to recover the excess of interest; but to entitle him to maintain the action, he must show, that he has paid, or offered to pay, all the principal lent, and the lawful interest. *Wharton v. Hibbard*, 290

Where the lender does not raise the objection at the trial, that the principal and legal interest had not been paid, but rests his defence on other, and different grounds, the fact of payment will be intended from his si-

lence, and he cannot, afterwards make the objection, on appeal, or in error. *Wharton v. Hibbard*, 290

Vide EVIDENCE, IV. 9. CHANCERY.

V.

VARIANCE.

Where, in an action of slander, the declaration alleged, that the words were spoken of and concerning the evidence given by the plaintiff, on a complaint made by him, before a justice of the peace, on the 20th of March, 1820, and the proof was, that the complaint was made before the justice on the 8th of March, 1820: *Held*, that the variance was not material. *M'Kinty v. Rob*, 351

VENDOR AND PURCHASER.

Vide COVENANT.

VENIRE.

Vide COURT OF GENERAL SESSIONS OF THE PEACE.

VIEW.

Vide DOWN.

W.

WILL.

1. A nuncupative will is not good, unless it be made when the testator is in *extremis*, or overtaken by sudden and violent sickness, and has not time to make a written will. *Prince v. Hazleton*, in error, 502
2. By the words, "last sickness," in the purview of the statute, (sess. 36. ch. 31. s. 14. 1 N. R. L. 303—367.) is to be understood the last extremity. *ib.*

Vide DEVISE.

WITNESS.

Vide EVIDENCE, 4.

END OF THE TWENTIETH AND LAST VOLUME.

